COMPARATIVE LABOR LAW DOSSIER
SUCCESSION AND TRANSFER OF BUSINESSES

Abstract

The Comparative Labor Law Dossier (CLLD) in this issue 1/2015 of IUSLabor is dedicated to succession and transfer of businesses. Aside from Spain, we have had the collaboration of internationally renowned academics and professionals of the following countries: Belgium, France, Italy, the United Kingdom, Chile, Costa Rica, Mexico, Uruguay, Venezuela, Canada and the United States.

El Comparative Labor Law Dossier (CLLD) de este número 1/2015 de IUSLabor está dedicado a la sucesión y transmisión de empresas. Además de España, hemos obtenido la participación de académicos y profesionales de prestigio de los siguientes países: Bélgica, Francia, Italia, Reino Unido, Chile, Costa Rica, México, Uruguay, Venezuela, Canada y Estados Unidos.

Título: Sucesión y transmisión de empresas

Keywords: succession and transfer of businesses, transfer of a group of workers
Palabras clave: sucesión y transmisión de empresas, sucesión de plantillas

IUSLabor 1/2015, p. 1-111, ISSN 1699-2938

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SUCCESSION AND TRANSFER OF BUSINESSES IN BELGIUM

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Introduction

In Belgium the transfer of business regulated by a collective agreement (see *infra*). To interpret the meaning of the provisions of this regulation the Belgian courts and doctrine will often look to the case law of the EU Court of Justice on the meaning of the provisions of Directive 2001/23/EC. The Belgian legal order thus tries to stay as close as possible to the meaning of the Directive. However sometimes the offered protection to transferred workers goes further than the one to be found in the minimum provisions of the Directive. As will be seen, sometimes there is still discussion in the legal doctrine on the scope of the granted protection.

1.b. What is the national law that implements the Council Directive 2001/23/EC?

Collective Agreement no. 32 bis has implemented the directive. The full title is Collective agreement no. 32 bis of 7 June 1985 on the conservation of workers' rights at the change of employers in case of a transfer of companies under agreement and regulating workers' rights who are to be taken over in case of transfer of assets after bankruptcy, amended by Collective agreement no. 32 ter of 2 December 1986, no. 32 quarter of 19 December 1989 and no. 32 quinquies of 13 March 2002. This is a national collective agreement, concluded in the National Work Council and which is made generally applicable and thus binding for all.

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

- Classic case of transfer of business

Article 6 Collective agreement 32 bis defines the scope of the transfer of business rules as follows: "[e]*very change of employer which is caused by any transfer of business, or a transfer of a part of the business, by agreement*." As transfer is to be qualified every transfer in view of the continuation of an activity (whether or not mainly economical), of an economic entity which maintains its identity, in the sense of an entirety of organized of resources. This article clearly refers to article 1 of the Directive.

The notion "economic entity" refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. An undertaking is seen as a social and economic whole, based on economic and social criteria. In case of doubt, the social criteria prevail.

Of most importance is the question whether the identity of the transferred enterprise is maintained or not. If not, it will not fall under the scope of the Directive, nor of Collective agreement 32 bis. In order to decide whether or not an undertaking retains its identity it is necessary to consider whether or not the undertaking was disposed of as a "going concern". To find out whether this is the case, the judge has to look at the factual circumstances, like:

- the type of undertaking or business;
- whether or not the business's tangible assets are transferred;
- the value of its intangible assets at the time of the transfer;
- whether or not the majority of its employees are taken over by the new employer;
- whether or not its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer;
- the period, if any, for which those activities were suspended.

The Court of Justice confirmed in several occasions that before a decision can be made, it is necessary to consider all the facts characterizing the transaction in question. No single factor is decisive. The concept of transfer of undertaking has since become the object of the interaction between two theories concerning identity: the organizational theory and the theory of activity. The Court finally chose for the organizational theory and elaborated very concrete guidelines to decide whether or not there is a transfer of undertaking. According to the organizational theory, there is a transfer when the transferee takes over an identical or at least similar organization. In this hypothesis the identity control is linked to the organization instead of to the activity. The Court applied the difference between labour and capital intensive sectors in the organizational theory.

- Transfer of business and collective agreements

In case of transfer of business, certain sectors have provided in collective agreements that the new employer has to take over the employees or a part of the personnel of the transferred business.

- Transfer of business derived from the transfer of a group of workers

The transfer or a group of workers can be an important fact to indicate the existence of a transfer of business. If the nature of activity of the enterprise is mainly labour intensive, the transfer of workers is even the main indication, and can succeed on its own to provide for sufficient proof of the existence of the transfer of the business. In this case the material assets are of less importance. On the other hand, when activity is characterized by certain important material assets (capital intensive), which are not transferred, there will be no transfer of business. This is conform the case law of the CJEU.

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

According to article 9 Collective agreement no. 32 bis, the change of employer on its own does not give sufficient reason for dismissal. This means that the dismissal of an employee is forbidden, as well for the transferor before the transfer as for the transferee after the transfer. Collective agreement no. 32 bis however does not determine a duration for this dismissal prohibition. The shorter the time between the dismissal and the transfer of undertaking is, the more suspicious the dismissal. Yet article 9, 2 Collective agreement no. 32 bis states that it is still allowed to dismiss workers cause of economical, technical or organisational reasons which constitute changes for the employment in the undertaking. This is even the case when the dismissal takes place shortly before or after the transfer. However these reasons can not only be a consequence of the transfer itself.

Collective agreement nr. 32 bis does not hold a sanction on the dismissal prohibition, so the dismissed worker can demand for the normal compensation in case of dismissal or the compensation for unfair dismissal. Also the compensation of the relatively new Collective agreement no. 109 for workers who are the victim of a manifestly unreasonable dismissal is be possible. Some courts also consider the disobedience tot the prohibition to dismiss as an abuse of one's own right and grant special compensation next to the normal one. By example a court granted a compensation of nearly 5000 euro to a dismissed worker who was laid off only one month after the transfer, since this period seemed too short for the employer to test the capacity of the workforce and consequently to start a reorganization.

In conclusion. The sanction will be a compensation, but the dismissal will still stand. It will not be declared null and void, thus the reinstatement of the worker is not obliged.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

Art. 20 of the Act on collective agreements of 5 December 1968 states that: "In case of a transfer of (a part of) the undertaking, the new employer (transferee) is bound by the collective agreement that was binding for the transferor, until the moment that the agreement stops working. If the individual employment contract was (implicitly) modified by the collective agreement, the modifications will continue to make part of the employment contract according to art. 23 of the Act on collective agreements, even if the collective agreement has stopped working.

It is less clear what are the consequences if the new employer belongs to another sector and is thus not bound by the same sectorial collective agreements as the former employer. There are two views in Belgian legal doctrine. On one side there is the opinion that article 20 should be read in a restrictive manner, thus allowing no modification at all. Another view is that the new employer could not possible be bound by such sectorial collective agreement, since this would infringe the entrepreneurial freedom and the freedom of association of the new employer. This last view seems to be supported by the EU Court of Justice in the cases *Werhof* and *Alemo-Herron* on the meaning of article 3 of the Directive. However also in this case the workers can be protected by article 23 of the Act on collective agreements.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

In principle the unilateral modification by the employer of the labour conditions is not allowed. An agreement with workers' representatives, the public authority or a third party has no influence whatsoever, since the modification merely relates to the obligations between the employer and the worker. In the judgment of 20 December 1993 and 23 June 1997 the Cour de Cassation said that article 1134,1 of the Civil Code ('Burgerlijk Wetboek') provides that the employer cannot unilaterally modify or revoke the labour conditions which are included in the employment contract, unless otherwise agreed upon. In the judgment of 13 October 1997 the Court added that article 20,1° of the Employment Contracts Act of 3 July 1978 entails the same protection. It is one of the basic characteristics of Belgian contract and obligations law that one party cannot unilaterally change the provisions of the contract. However, this only counts for the elements which are included in the employment contract. The employer can use his authority or instruction right (ius dominandi) –based on article 17 of the Employment

Contracts Act)– to alter elements which are not included in the contract. The Cour de Cassation thus has left the employer a *ius variandi* (the right to modify) for elements where upon no agreement exists. Yet, the employer still has to be careful since it is never allowed to abuse one's own right. This is the case when the use of the right is manifestly unfair, i.e. when the advantages for the employer are not in proportion to the disadvantages for the worker. The employer thus has to use his *ius variandi* in good faith.

Next, it is possible that the employment contract includes a modification clause, which could circumvent the protection of article 1134,1 Civil Code and article 20,1° Employment Contracts Act. However, article 25 of the Employment Contracts Act prohibits the existence of such clauses in employment contract. These clauses are to be declared null and void. Yet, the Cour de Cassation decided in a judgment of 19 October 1991 that article 25 only relates to the essential elements of the employment contract, and thus modification clauses for accessory elements are allowed. Of course, also general modification clauses, which give a broad right to the employer to alter all employment conditions, are to be declared null and void.

A last possibility for the new employer is to claim that the worker makes abuse of his contractual right to refuse modifications. Also in this case the abuse should be manifestly unfair. Thus only when the refusal of the worker to, by example, accept another function is not into proportion to the disadvantages for the employer. This is rather hard to prove and the judge does not have a broad margin of appreciation.

In conclusion, a unilateral modification of essential labour conditions by the employer is nearly always prohibited by Belgian law, this also counts for the transferee as new employer.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

Article 37, §1 of the Act of 28 April 2003 regarding the supplementary pensions states that in case of transfer of undertaking, it is under no circumstances allowed to reduce the on the instance of the transfer already acquired reserves of the affiliated workers. If this provision is complied with, it seems possible that the new employer can modify the pension commitments for the future. However, caution is prescribed, since this could also constitute a unilateral modification of essential labour conditions if the supplementary pension is found to be an essential element of the employment contract, in which case the new employer shall have to upheld the commitments of the transferor.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

Article 8 of Collective agreement no. 32 bis holds that both the transferor as the transferee are liable (*in solidum*) for debts already existing and arising from the employment contracts on the date of the transfer. Even if the transferor and transferee agree in the contract of transfer that only the transferee would be liable for the debts resulting out of the employment contracts, workers can still claim payments of the transferor since they are a third party to the contract of transfer and not bound by it.

Collective agreement no. 32 bis does not include any provision on the liability after the date of transfer. There are two concurring views in Belgian legal doctrine. The first states that after the date of transfer, the transferee becomes liable for all debts resulting from the transferred employment contracts, including payment of severance indemnities when terminating the employment contract of any of the transferred employees. The second view claims that also the transferor could be held liable for those debts, again in solidum with the transferee. This opinion is based on article 1275 of the Civil Code which prohibits the liberation of the original debtor without the permission of the creditor, in this case the worker. It is however clear that debts resulting from actions which date from after the transfer and have no link with the former employer, will not be attributed to the liability of the transferor.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

Article 20 bis of Collective agreement no. 5 of 24 May 1971 regarding the status of union delegates states that these delegates maintain their status and special dismissal protection until the end of their mandate. Yet, if the transferred undertaking loses its autonomy, the delegates will only be entitled to keep their status for a period of six months after the transfer, after which a recomposition of the union delegation will take place. However, since Collective agreement no. 5 has not been declared generally binding, not all employers are bound by these provisions. The status of the Trade Union Delegation is often the object of regulation in collective agreements at industry level, who contain similar provisions and who are declared generally binding. To determine the exact role of the Trade Union Delegation in every concrete situation, it is recommended to examine these collective agreements.

Article 21, § 10 of the Act of 20 September 1948 regarding the organization of business (*Wet op de organisatie van het bedrijfsleven*) and article 69 of the Act of 4 august 1996 regarding the wellbeing of workers also foresee a continuation of the Works Council

and the Health and Safety Committee in case of transfer of business, hereby implying the conservation of the status of worker's representatives until the end of their mandate.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

The obligation to inform and consult the employees concerning the transfer is laid down both in the EU Directive and in Belgian law. Under Belgian law, the employer who intends to amend the structure of the company must inform and consult the employees' representatives about such a decision. Consultation must take place about all envisaged measures regarding:

- employment of the personnel;
- the reason for the transfer;
- the legal, economic and social implications of the transfer for employees;
- any measures envisaged in relation to the employees.

When a Works Council is established, the above described obligations derive from Collective agreement no. 9 of 9 March 1972 regarding the Works Councils. Article 11 stipulates that in case of (i.a.) a transfer, the Works Council will be informed in due time and before the decision is made public. The Works Council will be consulted actually and prior (see also article 3) to the decision, in particular with regard to the repercussions on the employment perspectives for the personnel, the work organization and the general employment policy. This must enable the Works Council to expertly conduct discussions during which the members will be able to advice, make suggestions or objections. Employees' representatives cannot be confronted with a settled decision and the information and consultation cannot be reduced to a purely formal concern. Criminal sanctions are possible if the procedure is not followed correctly.

In the absence of a Works Council, the Trade Union Delegation will take over the tasks of the Works Council according to Collective agreement no. 5 of 24 May 1971. As was mentioned before CBA n° 5 has not been declared generally binding, not all employers are bound by these provisions. To determine the exact role of the Trade Union Delegation in every concrete situation, it is recommended to examine the sectorial CBA's.

In the absence of a Works Council and a Trade Union Delegation, the Health and Safety Committee will take over the tasks of the Works Council or the Trade Union Delegation according to article 65decies of the Act regarding the wellbeing of workers.

Where there is neither a Works Council, neither a Trade Union Delegation nor a Health and Safety Committee in the undertaking, the concerned employees need to be informed prior to the decision (art. 15*bis* Collective agreement no. 32*bis*). The information implies:

- the (proposed) date of the transfer;
- the reasons for the transfer;
- the legal, economic and social consequences of the transfer for the employees;
- any measures envisaged in relation to the employees.

In this last case, the employees must only be informed and not consulted, contrary to other cases.

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

Capital III of the Collective agreement no. 32 bis gives certain rights to workers of transferred undertakings after bankruptcy. It is applicable when the transfer takes place in the period of six months after the bankruptcy (article 11). Workers who are still bound by an employment contract on the moment of bankruptcy as well as workers who were dismissed during the month before the bankruptcy can enjoy the protection of Capital III. This is however only the case if the new employer decides to continue the activity of the undertaking. Article 12 grants the new employer the right to choose which workers he wants to keep and which not. This means that the workers do not have a right to be transferred (unlike after the transfer by agreement). Yet if the workers are transferred, article 13 holds that the labour conditions which were collectively agreed upon under the former employer are binding for the new employer. Article 14 furthermore states that the seniority of the workers, which they have built up under the former employer, has to be respected by the new one with regards to the calculation of the term or notice or severance pay in case of dismissal.

SUCCESSION AND TRANSFER OF BUSINESSES IN FRANCE

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Introduction

French law has been inspired very early by the succession and transfer of businesses with the Act of 19 July 1928 which introduced what has become in 2008, article L.1224-1 in the French Labor Code (previous article L. 122-12) according to which all employment contracts existing on the date of the transfer continue between the new employer and the company's staff. This article thus permits to deviate from the contract's relative effect principle resulting from article 1165 of the French Civil Code.

It is noteworthy to mention that in French law, an employee cannot object to a transfer, and the only other realistic option is resignation. However, terminations directly before, during, or immediately after a transfer is highly scrutinized and more likely than not deemed null and void.

Next, article L.1224-2 of the French Labor Code (hereinafter Labor Code) dating back to a law of 28 June 1983, implements the principle laid down in the Council Directive 2001/23/CE concerning the transferor's obligations in a situation of transfer which are described next.

However, certain Directive's provisions (such as article 7 §6 concerning the information of the transferor's employees when there is no staff representatives in the company) are not transposed in French law and are not binding for the employee since the Directive is not precise and unconditional and cannot be invoked during a dispute since the French state did not take, within the time limits allowed by the directive the necessary measures of transposition. This is why the French judges interpret the provisions concerning the transfer of businesses considering the Directive 2001/23/CE.

[1] http://www.labourlawnetwork.eu/

The complexity of the definition and the delimitation of the notion of "transfer of business" raises many practical questions and leads to massive case law.

1.b. What is the national law that implements the Council Directive 2001/23/EC?

The provisions of the Council Directive 2001/23/CE are implemented in French law by articles L.1224-1 and L.1224-2 of the Labor Code.

The obligation under article 7 paragraph 6 of Directive 2001/23/EC has not been implemented into French law so employment contracts are automatically transferred through the application of article L. 1224-1 of the Labor Code, which does not provide for an obligation of information by the employer (Court of Cassation, Social Chamber, 17 December 2013).

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

Article L. 2323-19 of the Labor Code requires in any case of transfer both the transferor and the transferee to inform and consult their respective Works Council (if any) in respect of the proposed transfer. The Works Council must be provided with complete information (at least three days before its meeting) concerning the date of the transfer, the reasons for the transfer, the identity of the transferee, a description of its respective group activities and the possible consequences of the project on the employees. "Consultation" means that the works council members will be asked to give their opinion on the prospective project. The opinion issued by the Works Council is not binding on the transferor's decision to transfer the business.

2.1. The situation of transfer of businesses is found in several scenarios in French law

Indeed, according to article L.1224-1 of the Labor Code:

> "*In the event of a change in the employer's legal situation, notably, as a result of inheritance, sale, or merger of the undertaking, a change in its legal form or its incorporation, all employment contracts in force on the date of this change in the employer's legal situation continue between the new employer and the undertaking's staff*".

This article provides a non-exhaustive list of the forms that a transfer of businesses may take, such as sale, inheritance, transformation of a business, or even sale of a company.

It should be noted that it does not apply in cases of creation of an economic interest grouping ("GIE"), of a European partnership ("GEIE") and the taking over of an undertaking in financial difficulties by its former employees.

According to Court of Cassation, employment contracts will automatically be transferred if the operation involves the transfer of an autonomous economic entity which retains its identity and where the activity is continued or renewed.

Courts look at the circumstances as a whole to determine whether there is a transfer of an economic entity. A transfer is deemed to have taken place when the transferee take possession of the property and rights comprising the entity, even if the transfer documents have not been signed at the date. A lease of the business ("*location-gérance"*) can constitute the transfer of business under article L.1224-1 of the Labor Code. If the organization of the activity remains the same, a transfer can take place by means of a series of outsourcing or franchising deals.

An autonomous economic entity is defined as "*an organized grouping of individuals and tangible or intangible assets that enables the continued running of an economic activity with its own objective*" (Court of Cassation, Social Chamber, 7 July 7, Bull. civ. V, n°. 363).

Therefore, the following is necessary and sufficient in order for article L.1224-1 of the Labor Code to apply:

- Existence of assets and presence of employees dedicated to the performance of an economic activity;
- Continuation of this activity by a new entity, without any modification made to its "identity".

It is well-established that these conditions are cumulative and as a consequence, taking over assets remains an element without which article L.1224-1 of the Labor Code cannot apply:

> "*Merely having another company continue the same activity does not suffice for there to be a recognized transfer of an autonomous economic entity*" (Court of Cassation, Social Chamber, 26 June 2008, n° 07-41.294).

In situations where article L.1224-1 of the Labor Code applies, the transfer of the employment contracts to the new employer concerns all the employees assigned to the transferred economic entity and who hold an employment contract in force with the transferor on the date of the transfer. The fact that the term of the contract is fixed or unfixed does not matter.

Article L.1224-1 of the Labor Code is considered to be part of public law. Therefore, the employment contract's transfer is obligatory both for the transferee and for the employees who cannot block the change of employer.

Contrary to the position taken by the European Court of Justice (ECJ, 24 January 2002, Case n°51/00, Temco), Court of Cassation considers that the employee does not have the right to object to the transfer. In the past, it considered that the refusal by the employee of a transfer under L.1224-1 had to be treated has a resignation (Court of Cassation, 5 November 1987, Bull. Civ. V, n° 616).

The only exception was where the transfer involved an essential change to the employment contract, in which case the employee could legitimately refuse the amendment of the employment contract imposed by the transferee and indirectly refuse the transfer of his/her employment contract.

Since then, the French *Cour de Cassation* has however changed its position and no longer treats such a refusal as a resignation. The employee assigned to a transferred undertaking has only two options: either resign or keep working for the transferee. The employee's refusal to work for the transferee allows the latter to dismiss the employee for serious misconduct (Court of Cassation, Social Chamber, 25 October 2000, Bull. Civ. V, n° 307).

2.2. How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement?

When the conditions of application of article L.1221-1 of Labor code are not fulfilled, the parties can voluntarily provide the application of this article in a collective bargaining agreement.

2.3 How does French law regulates the situation of transfer of business derived from a transfer of a group of workers?

As already discussed above, the application of article L.1224-1 of the Labor Code requires that the operation involves the transfer of an "autonomous economic entity" and that it retains its identity and where the activity is continued or renewed.

The autonomous economic entity is defined by French case law as "*an organized group of people and assets dedicated to the running of a business which has its own objective*". The existence of a client base and the means of carrying out a business (premises, equipment and inventory) are the main factors in considering whether the business concerned forms an economic entity. However, case law does not necessarily require those two criteria to be satisfied. In some cases, a transfer of clients without the means of carrying out a business may be regarded as the transfer of an economic entity.

The entity is defined as an organized sets of people and tangible or intangible elements permitting the exercise of an economic activity which pursues a specific objective (Court of Cassation, Social Chamber, 7 July 1998).

The courts in France have, over the years, extended the scope of article L. 1224-1. Careful review of the facts of each matter will be required to assess whether a transfer has taken place and who has been transferred. The fact that the transferee has taken over some of the employees does not automatically trigger the application of article L. 1224-1, but is one of the criteria for its application

Application of the article L.1224-1 will depend on the transfer of operating components used for the execution of the activity: it can be tangible elements such as premises (Court of cassation, Social Chamber, 25 October 2006, RJS 2007, n°14) or intangible such as the brand or the customer (Court of Cassation, Social Chamber 14 May2003, RJS 2003, n°985).

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

In French law, the principle established in various steps is that a dismissal can't be motivated by a transfer of businesses.

Court of Cassation held for the first time in a case dated 20 January 1998 that a dismissal which its sole cause is the transfer of the businesses is considered is to be without any effect:

> "*Mais attendu que si comme le soutient exactement le pourvoi, la cession du fonds de commerce exploité par la société Pompes Maroger a entraîné le transfert d'une entité économique autonome, dont l'activité a été poursuivie par la société Vallat-Irrig-Elec qui était tenue, en application de l'article L. 122-12 du Code du travail de reprendre les contrats de travail des salariés, il en résulte seulement que les licenciements prononcés par le mandataire liquidateur étaient sans effet*". (Court of Cassation, Social Chamber, n° 95-40.812)

In a case dated 20 March 2002, Court of Cassation specified that the employee had an option right. In fact he can request the transferee the continuation of its contract illegally broken up or request author of the illegal dismissal the compensation for the prejudice resulting therefore:

> "*Le salarié peut, à son choix, demander au repreneur la poursuite du contrat de travail illégalement rompu ou demander à l'auteur du licenciement illégal la réparation du préjudice en résultant*". (Court of Cassation, Social Chamber, 20 March 2002, n° 00-41651).

However, if the employee is informed by the transferee before the expiry of the notification of its intention to continue the contract without any modification, the change of employer is imposed on it:

> "*Mais attendu que le transfert d'une entité économique autonome entraîne de plein droit le maintien, avec le nouvel employeur, des contrats de travail qui y sont attachés et prive d'effet les licenciements prononcés par le cédant pour motif économique ; que si le salarié licencié à l'occasion d'un tel transfert a le choix de demander au repreneur la poursuite du contrat de travail rompu ou de demander à l'auteur du licenciement la réparation du préjudice en résultant, le changement d'employeur s'impose toutefois à lui lorsque le cessionnaire l'informe, avant l'expiration du préavis, de son intention de poursuivre, sans modification, le contrat de travail*". (Court of Cassation, Social Chamber, 11 March 2003, n°01-41842).

On the contrary, the employee keeps its option right if the transferee informs him/her of its intention to continue the contract only after the expiry of its notice period following its dismissal:

> "*Mais attendu que le changement d'employeur consécutif à la cession d'une entité économique autonome ne s'impose au salarié antérieurement licencié pour motif économique qu'à la condition que le cessionnaire l'informe, avant l'expiration du*

> *préavis, de son intention de poursuivre, sans modification, l'exécution du contrat de travail*". (Court of Cassation, Social Chamber, 25 October 2007, n° 06-42437).

As a conclusion, the employee dismissed in violation of article L.1224-1 of Labor Code has several possibilities.

It should be noted that the burden of reparation for the damage suffered is on the transferor or the transferee according to their shares of responsibility in the loss of job, the first by taking the initiative of a dismissal and the second by preventing the continuation of the employment contract.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

The employment relationships which existed at the time of the business are transferred from the transferor to the transferee by operation of law (article L. 1224-1 of the French Labor Code).

The transferor's rights and powers under or in connection with the employment contracts are also transferred to the new employer. For example, the "disciplinary power" of the former employer is transferred to the new employer, who can dismiss a transferred employee for fault occurring prior to the transfer.

The employees to be transferred are those who worked in the transferred part of the business on the date of the business transfer, whether on a full time basis or otherwise. Indeed, employees may be transferred when only a part of their work is relevant to the business transferred. In the event of transfer of part of a business, the principle of continuation of employment contracts applies only to the employees working in the part of the business transferred. An employee partially deployed in the transferred part of the business will become an employee of the new employer for the purpose of that specific activity.

Above all, two situations have to be distinguished depending on the fact that the main activity after the transfer of businesses remains the same or not.

If the main activity remains the same after the transfer (for example in the situation of a merger where the transferee is engaged in the same activity as the transferor), the collective bargaining agreement applicable will not change since it applies to all the companies which are in sector.

The situation is different when there is a change of the main activity for example in the hypothesis of a merger where the transferred activity becomes a small part of the activity of the transferee. In fact in this case, the transferee will be engaged in a different sector and the collective bargaining agreement applicable is different.

However in this context, article L.2261-14 of the Labor Code which applies to transfer of undertakings, provides that a collective agreement will continue to apply after a merger or a sale for example, until a substitute agreement is concluded, or in the absence of one, for a period of one year from the end of the notice period that is to say three months. If no substitute agreement has been concluded after 15 months, employees will keep their acquired individual rights ("*avantage individual acquis*") under the agreement.

According to the article 3 of the Council Directive 2001/23/EC:

> "*Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year*".

It follows from the foregoing that French regulation is in compliance with the Council Directive.

If a new agreement is concluded between the unions and the transferee before the end of the period of 15 months, the new agreement will replace the previous collective agreement. During this period, transferred employees will be covered by the collective agreements of both the transferor and the transferee and will benefit from the most favorable rights and advantages provided by both. Any comparisons must be between similar types of advantages.

However, if during this period no agreement is concluded the employees under the previous collective agreement keep their acquired individual rights. The amendment of the agreement's terms is possible only with the employee agreement and will follow the procedures which apply to changes to employment contracts.

Court of Cassation had the opportunity to defined the notion of acquired individual right as one which, at the date when the collective agreement ceased to apply, assured the

employee either remuneration or a right which it benefited from personally and which corresponded to a right which was already in existence and not only merely potential:

> "*L'avantage qui, au jour de la dénonciation de la convention ou de l'accord collectif, procurait au salarié une rémunération ou un droit dont il bénéficiait à titre personnel et qui correspondait à un droit déjà ouvert et non simplement éventuel*". (Court of Cassation, Social Chamber, 13 March 2001, n° 99-45651).

Employment contracts are automatically transferred where the Employee Transfer Rules apply, without any modification whatsoever. The terms and conditions of the transferred employees should therefore not be modified after the transfer.

The courts do sometimes accept that the transferred employment contract can be modified following the transfer, but on the strict conditions that both:

- The employee expressly agrees to the modification (that is, they accept the modification in writing, while entering into an amendment to their initial employment contract).

- The new employer does not actually commit fraud to the Employee Transfer Rules. Courts notably rule for fraud where the new employer has proposed a new employment contract to the transferred employees on the day of the transfer (Court of Cassation, Social chamber, 9 March 2004, No. 02-42.140), or when the proposed modification actually meant that the employee was downgraded (Court of Cassation, Social chamber, 14 January 2004, No. 01-45.126).

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

First, the modification of workers' labor conditions established in the employment contract by the transferee is prohibited by French law. In fact, changes in contract of employment require the employee's consent.

Two situations can be distinguished: the change of contract's essential elements and that of employee's working conditions. Whereas changing working conditions does not require the employee's consent, if the employer wants to change an essential element of the contract, he will need the employee's consent.

Article L.1222-6 of Labor Code provides:

> "*Lorsque l'employeur envisage la modification d'un élément essentiel du contrat de travail pour l'un des motifs économiques énoncés à l'article L. 1233-3, il en fait la proposition au salarié par lettre recommandée avec avis de réception*".

Next, benefits that have become mandatory as a result of a common practice within the transferor, collective atypical agreements (such as agreements not signed with trade unions, but rather with the Work Council) and unilateral commitments of the employer are transferred to the transferee.

According to French case law (Court of Cassation, Social Chamber, 23 September 1992, Dr. soc., 1992, p. 926) a "*benefit that has become mandatory as a result of a common practice is binding on the new employer*".

However, the new employer may terminate such rules after informing the employees' representatives and complying with a sufficient prior notice of termination to be given to each employee concerned.

With regard to mandatory and optional profit-sharing plans, they are immediately terminated upon the transfer toward the transferred employees. If not profit sharing plan is in force within the transferee, the latter must enter into negotiations within six months from the date of the transfer (for an "*accord d'intéressement*") and six months from the date of the end of the financial year during which the transfer took place (for an "*accord de participation*"), with a view to setting up a profit sharing plan.

There is no obligation to reach agreement but negotiations must be concluded in good faith.

Concerning saving plans, it is possible to provide that they will not be transferred to the transferee. In the absence of such a provisions, depending on how such scheme was set up (by company collective agreement of unilateral commitment of the employer), the general rules described above should apply.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

As French case-law currently stands, pension commitments that employees affected by the transfer had with the transferor are not transferred to the transferee. For example, concerning the retirement benefit, it has been judged that it does not constitute an acquired individual right (Court of Cassation, Social Chamber, 20 January 1971, n° 70-40.181, Bull. Civ. V, n° 36).

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

Yes. In accordance with article 3.1 of the Council Directive, article L.1224-2 of the Labor Code provides that the transferee will be liable for all obligations for which the transferor was responsible at the date of the transfer as long as the change of employer does not take place in the context of insolvency proceedings and that any agreement between the transferor and transferee exists.

As a consequence, employees can make claims for amounts due before the transfer, but can also choose to make claims against the transferor.

According to Article L.1224-2 of the Labor Code, the transferor must reimburse the transferee with any amounts paid by the transferee for debts arising before the transfer, unless the costs were taken into account in the transfer agreement.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

In the context of a transfer, the mandates of the transferor's personnel representatives are maintained if the company preserves its autonomy or becomes an establishment that is distinct from the transferee.

Court of Cassation interprets article L.1224-1 of the Labor Code in a rather broad way. In fact, it has been judged that the transferred company only needs to withhold its autonomy in fact, even though it has lost its formal or legal autonomy (Court of Cassation, Social Chamber, 28 June 1995, RJS 8-9/95, n° 904). In other words, it would suffice that the transferred economic entity has maintained its identity and that its business activities has been continued after the transfer.

As a consequence, since by definition article L.1224-1 of the Labor Code applies to situations where the transferred economic entity has maintained its identity and its business activities have been continued after the transfer, in accordance with the interpretation retained by the Social Chamber, every protected employee whose employment contract is transferred pursuant to article L.1224-1 of the Labor Code maintains its office within the transferee.

This interpretation has been criticized by several authors (Jean Savatier, Dr. Soc., 2001, at pages 104 to 326) and in particular by the Council of State (Council of State, 8 January 1997, RJS 2/97, n° 171) which ruled that maintaining the term of office can

only be guaranteed if the transferred entity withholds its formal or legal autonomy. Otherwise, the term of office expires on the date said change comes into force (Council of state, 8 January 1997, RJS 2/97, n° 171).

In practice, the term of office can be reduced or extended to take account of the usual date of elections in the transferee, through a collective agreement between the new employer and the representative trade union organizations existing in the employer or failing this, the union delegates or members of the Works Council concerned.

If the employer does not preserve its autonomy or does not become an establishment that is distinct from the transferee, the mandates of the personnel representatives of the employer come to an end on the date of the transfer. In this case, the former personnel representatives continue to benefit from their protected status: union delegates and members of the Works Council for a period of six months and union representatives for twelve months.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

A distinction must be made between two situations: the presence or not of personnel representative in the company.

When there is not personnel representative in the company, the employer does not have the obligation to inform the employee.

Article 7 §6 of the Council Directive 2001/23/EC provides that when there are no staff representatives in the company, the employees concerned by the transfer must be beforehand informed about date fixed or proposed for the transfer of the motive for the transfer, the legal, economic and social consequences of the transfer.

However, this article has not been transposed yet into French law and does not impose any obligation to the employer to apply it. Consequently, employees cannot ask for repair of damage bound to the absence of information.

When staff representatives in the company exist, the French Labor Code provides the information and consultation obligations of the transferor and transferee, in compliance with article 7 of the Directive 2001/23/CE.

In fact, pursuant to article L.2323-19 of the Labor Code:

> "*The works council must be informed and consulted on any changes in the economic or legal organization of the company, especially in the event of a merger, sale, or major changes in the production structure of the company, as well as of the takeover or sale of subsidiaries*".

Pursuant to article L.2323-2 of the Labor Code:

> "*The consultation process must be completed prior to any binding decision being taken by the head of the company*".

Changes in the economic organization of the company means notably the creation, transformation or shutdown of a division, department, office or establishment; it can also mean a substantial change of the internal organization of different divisions or departments in the company; and it can also include contemplated subcontracting or the constitution of an economic interest group (DRT Circ. 12, 30 November, 1984 n°1-4: BOMT n° 84-8 bis).

The Labor Code does not stipulate the number of meetings that must be held, nor does it provide a specific schedule to be followed. It only lays down the principle according to which the Works Council must be allowed a sufficient time period to examine both the documents it was given and the replies to its questions, in order to render an informed opinion.

The Works Council must be provided with sufficiently detailed written information to enable it to render an informed opinion on the plan and to be validly consulted.

If the employer has complied with its information requirements, the Works Council must, in theory, render its opinion in due form.

It is only once this opinion has been obtained that an agreement on the sale of the company's shares can be executed and subsequently implemented.

In this respect, it is important to note that the Works Council does not have a right of veto on the operation: the company may proceed with the sale in spite of a negative opinion given by the Works Council.

Failure to consult the Works Council prior to making a decision to transfer is a criminal offence which carries penalties of up to one year's imprisonment and /or a fine of up to

3.750€. The Works Council may also bring an action before the Court in summary proceedings in order to suspend the transfer until the consultation procedure has been properly carried out.

Concerning the information of employees in particular, Court of Cassation has judged that the provisions of article L.1224-1 of the Labor Code do not oblige the transferee to individually inform the employee concerned by the modification of the shareholding or the sale of the company where he was employed (Court of Cassation, 14 December 1999, n°97-43.011).

However, Law n° 2014-856 dated 31 July 2014 related to the social and solidarity economy (JO 1 August 2014) has introduced a new obligation for small and medium-sized companies (notably companies with fewer than 50 employees) to provide information to its own employees in case of a contemplated sale of shares or of an ongoing business. The law aims at encouraging the acquisition of a business by the employees, prior to selling the business to a third party (see below).

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

Yes. By contrast with article 5.1 of Council Directive 2001/23/EC, French law allows the transfer of businesses when the company is in bankruptcy proceedings. However, in this case, the transfer of businesses is subject to a specific regime.

In fact, according to article L.1224-2 of Labor Code, in a situation of safeguard, receivership or liquidation proceeding, the new employer is not obliged to the obligations that had the old employer to the employees whose employment contract continues:

> "*Le nouvel employeur est tenu, à l'égard des salariés dont les contrats de travail subsistent, aux obligations qui incombaient à l'ancien employeur à la date de la modification, sauf dans les cas suivants:*
> *1° Procédure de sauvegarde, de redressement ou de liquidation judiciaire ;*
> *2° Substitution d'employeurs intervenue sans qu'il y ait eu de convention entre ceux-ci.*
> *Le premier employeur rembourse les sommes acquittées par le nouvel employeur, dues à la date de la modification, sauf s'il a été tenu compte de la charge résultant de ces obligations dans la convention intervenue entre eux*".

As a result, in a context of a bankruptcy preceding the new employer is only obliged to pay the debts incurred after the transfer.

11. Other relevant issues regarding transfer of businesses

In the French legal system, there is not a specialty in the regulation of transfer of businesses for senior managers.

The new provisions concerning the sale of business and the subsequent employee's information should be noted:

As mentioned above, Law n° 2014-856 has introduced an obligation for small and medium-sized companies to provide information to its employees in case of a contemplated sale of shares or of an ongoing business.

Employees must be provided with "information to enable them to make an offer". An official Memorandum, published on 30 October 2014, states that the information must simply include a statement of the seller's wish to sell and a statement indicating that the employees may make an offer. This Memorandum, whilst is an official explanation of the Law, is not however binding in Court.

Employees are obliged to keep the information confidential, but can be assisted by a representative of the Regional Chamber of Commerce and Industry, the Regional Artisan Chamber of Commerce and certain individuals designated by the employees according to criteria to be defined by decree.

The information can be provided to the employees by any means (such as email, registered letter or even formal notice on the Target notice board) provided it is possible to prove receipt of such information by the employees (e.g. read receipts for emails, signed delivery for letters, a signature confirming that they have read the notice displayed, etc.).

The information must be provided to the employees at least 2 months prior to the closing of the proposed transaction. In the case of companies with fewer than 50 employees, if all of the employees respond before expiry of the 2-month period, to confirm that they are not interested in making an offer, the target is not obliged to wait until the end of the 2-month period to complete the transaction.

The obligation to provide information does not constitute a preemptive right for the employees, since the seller should remain free to accept or refuse the offer(s) made by

the employees. In the absence of any published case law on this matter, we assume that the acceptance or refusal may be done on a discretionary basis.

Finally, non-compliance with this obligation can result in the cancellation of the sale. Any employee can bring a claim for cancellation before the Commercial Court within two months from the sale's publication in the event of the sale of an ongoing business, or within two months from the date of the employees' information regarding the sale in the event of the sale of shares.

Moreover, Decree n° 2014-1254 of 28 October 2014 related to employees information in the case of transfer of their company (JO 29 October) has been taken for the application of Law n° 2014-856.

It specifies concepts mentioned in the law and completes the regulatory part of the Commercial Code, specifying information procedures for employees concerning the owner's decision to sale the company. Employee who is interested in buying the company must inform the business leader that he/she will be assisted by a person of his/her choice. This person will be under obligation of confidentiality. The Decree also specifies that a sale happening at the end of an exclusive negotiation is not subject to prior information requirements of employees if the exclusive negotiation contract was concluded before 1 November 2014.

It is also worth noting the particular context of a partial transfer of activity in French regulation:

At first, Court of Cassation judged in the context of a partial transfer of activity to which Article L.1224-1 applies, that the only employees transferred to the transferee were those assigned exclusively to the branch of activity being transferred.

Then, it abandoned this requirement and ruled that the employment contract could be split when employees carried out activity partially within the branch of activity transferred. When an employee works for 40 percent of its time for the transferred activity the contract of employment is partially transferred (Court of Cassation, Social Chamber, 2 May 2001, n° 99-41.960).

SUCCESSION AND TRANSFER OF BUSINESSES IN ITALY

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1.b. What is the national law that implements the Council Directive 2001/23/EC?

Council Directive n. 77/187 of 14 February 1977 on the "safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses" has been implemented into the Italian legal system firstly by Act n. 428/1990, which has modified article 2112 of Civil Code. The same article has been repeatedly changed by Act n. 18/2001, in order to update the legal rules to Directive n. 2001/23/CE, and lately by Legislative Decree 276/2003 (which goal was to reorganize the whole labour market regulation). Article 47 of Act n. 428/1990 contains separate provisions on unions' rights on information and consultation and a particular disposition on transfer of undertaking in case of bankruptcy or insolvency proceedings.

After 25 years of implementation, Italian scholars and judges have not understood exactly the meaning of the Directive. At the very beginning, it was considered as a procedural burden on the management prerogatives: the employer's wish to transfer his/her business has to follow strictly the procedure, in order to avoid that the assignment was declared void by the courts. Nobody was really interested in the idea that information and consultation duties were a way to involve all the stakeholders in the decision making on the destiny of the enterprise. This stage ended when, in the early years of the cntury, the Parliament changed the law to make easier a transfer of undertaking. When it was stated that the part of business can be identified as such by the parts, at the time of transfer, the jurisprudence took a different course, holding that no control could be kept on enterprises' decision to assign. Few years later economic crisis diverted the scholar's attention away from the Directive and the Fiat case consecrated the idea that the Directive provisions were basically useless. Court of Justice decision of March 6th 2014 (C 458/2012) on Telecom Italia case is such a recent case to have already affected the direction of jurisprudence.

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

For the purposes of article 2112, "transfer of an undertaking" means any assignment which, as a consequence of a contract cession or a company merger, changes the ownership of an organized economic activity. Also in case of usufruct or lease of business the article has to be applied.

According to the Directive, which applies in case of transfer of parts of businesses, also a section or branch of an enterprise can be included in the purposes of article 2112 of the Civil Code, when it preserves its autonomy in the transfer as an autonomous part, even if it is identified as such by the assignor and the assignee at the time of transfer.

It has been debated for a long if, in case of contract work, employees dismissed by contractors that do not win a new contract in a competitive tendering have to be engaged by the new enterprise, which has won the contest. Now article 29, par. 3 of Legislative Decree n. 276/2003 ("Biagi Act") stated that, when a new contractor hires employees already engaged, in pursuance of law, national collective agreement or because of a binding clause of the same contract, the workers, in these situations, are not covered by the regulation relating to transfers of undertakings.

Despite the clear illogicality of the provision, no case law has been registered on this point and there is no tribunal which has requested the Constitutional Court to review the constitutionality of this provision, before applying it (the Directive cannot have direct effect in this case because the law is clear enough). Nonetheless it is accepted, according to the EUCJ cases, that if the enterprise changes his owner by means of indirect assignment (f.i. in case of lease to different employers) the Directive has to be applied.

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

The transfer of business does not *per se* represent a termination cause, because employer's termination rights remains unaffected by the law. In other words, an employee can be dismissed in consequence of the transfer if, according to the general provisions of law, the employer proves that the assignment implied, for instance, a re-organization of the enterprise such as to justify a reduction of personnel.

Actually, when the undertaking is transferred because of a crisis, very often the transferee unlawfully signs a preliminary agreement with the transferor to identify the number of employees who will be transferred. This is lawfully accepted because the part of business can be identified as such by the parts at the time of the transfer. To avoid this result, judges have entered a test of previous autonomy of the part of business in order to avoid that employees not transferred could be dismissed in force of a plan of reorganization laid down by the transferor enterprise.

In any case, employee unlawfully dismissed can obtain a judicial order for the transferor to reinstate him, with compensation for loss of salaries (article 18 workers' statute).

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

In the event of transfer of an undertaking, the terms and conditions of employment in contracts and collective agreements are safeguarded. The transferee is bound to apply the financial and regulatory treatments contemplated by national, territorial and company's collective agreement prevailing at the time of transfer, until termination, unless they are replaced by other collective agreements applicable to the enterprise of the transferee.

Although article 2112 c.c. provides that the replacement occurs exclusively between collective agreements of the same level, the famous motor company FIAT (now FCA) appealed to this provision to escape from the national collective bargaining system.

Firstly Fiat announced a reorganization and intended merger into a new holding company; then a new company was created, without applying the national collective agreement to the few hired employees, but signing a new one, with different conditions in working hours and in shift work; so Fiat was ready to transfer the whole activities to the new company which replaced the previous terms and conditions of employment with the new agreement; finally Fiat merged into FCA on October 2014.

The industrial Tribunal in Turin hold that the transfer was fully legal and that employees represented by union which had not sign the new company-level agreement had the only right to have the national agreement applied until the date of his expiry.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

According to Italian doctrine the employment relationship is a contractual one; managerial prerogatives include manpower organization, shift work, timetable and so on: the only way for the employer and the worker to change terms and conditions of their agreement is to sign a compromise before special tripartite commissions, appointed by Minister of Labour o by the national collective bargaining (see article 2113 of Civil Code and articles 410 and 411 Code of Civil Procedure).

Actually, when the new owner wants to reduce the paid salary, easily he can ask the workers representative to discuss a plant level "harmonization" bargaining, trusting the unions will not refuse at the end to sign it, because of the fear of job losses.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

For this point there is no express disposition, and the answer has to be found in the general principles of the subject matter (Legislative Decree n. 252/2005, article 14).

Pension funds receive contributions on voluntary basis, so the transferor is not obliged to pay for the new employees if nobody asks for it. So, until the employee's request there is no liability, after it, the transferor is obliged only to pay for the future. Different solution will be applied for company, such as bank of pharmaceutical, which pay directly pensions due to ancient provisions. For these cases, the Directive's principles on joint liability will apply without exception.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

According to the original provisions of article 2112 c.c. the transferor was liable for the past credits only if he/she was aware of them at the time of the transfer, or if they resulted from the book of the enterprise or from the labour documents of the employees. The new law affirms now the liability of the transferor for all credits of the employees. This is a *in solido* liability which means that the employee can claim the fulfillment to the new, and to the previous owner, as well.

The law laconically provides that by the procedure set by the law (as above mentioned) the employee may consent to the release of the transferor from the obligations deriving

from the labour relationship. Because Social Security contributions are due by means of the binding force of statutes, they are not properly considered employee credits and the guarantee laid down by the law does not apply to this special kind of credits.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

No express provision is included within the statutes which have enacted the Directive in Italy. Because the employee retains all the rights deriving from the labour relationship, it has been argued that also the right to be represented by unions' shop stewards has to be guaranteed (M. GRANDI), regardless of the autonomy of the transferred part of business.

The Supreme Court of cassation hold (judgment n. 6728/2003) that elected unions representatives have to be recognized by the transferor as well, when the corresponding employees have been transferred.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

The provisions of article 47 of Act n. 428/1990 are a simple translation of article 7 of the Directive and nothing has been added or eliminated.

It is important to stress that, according to the jurisprudence, the agreement signed by transferor and transferee in violation of information and consultations duty is void and the enterprise or the part of business has to be redelivered to the former owner by means of judicial order. Transferred employees have to be considered as illegally dismissed and they can obtain a judicial order for their reinstatement by the transferor.

It is not clear if this sanction keeps the parts from stipulating a new agreement, but the execution of the order of reinstatement of employees is so great a burden that very often the transferor prefers to pay a high lump sum to the plaintiff to waive the legal action.

Recent legislation (Act n. 23/2015) has cancelled reinstatement for this case, so it is possible that in the future many cases will be decided by the courts.

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

In case of bankruptcy or insolvency proceedings, to make easier the transfer of undertaking, Act n. 428/1990 (as amended by Decree n. 83/2012) allows collective bargaining to fail to observe Directive principles of joint liability, making lawful for the transferor to engage only a part of employees. Workers not engaged have anyway a right of priority in case of new hiring.

SUCCESSION AND TRANSFER OF BUSINESSES IN SPAIN

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Introduction

Prior, in the Spanish legal system, article 44 of the Workers' Statute (Royal Legislative Decree 1/1995, March 24) (ET, hereinafter) expressly regulates the case of succession and transmission of companies and the labor consequences derived from this circumstance. This regulation transposes into national law the EU regulation regarding this matter: Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

In summary, it can be stated that when a «transfer of business» occurs, the legal regulation recognizes workers affected by this process a set of legal guarantees, which can be summarized in (i) the prohibition of the termination of their employment contract without another cause different from the transfer of the business, (ii) maintenance of their working conditions, including the collective bargaining agreement applicable prior to the transfer and (iii) joint liability of the transferor and transferee regarding labor and Social Security debts existing prior to the transfer.

1.b. What is the national law that implements the Council Directive 2001/23/EC?

Article 44 of the Workers' Statute. An article whose current wording dates from the reform introduced by Law 12/2001, so as to adapt its content to the provisions of EU Directive 2001/23/EC. Not having suffered, since then, any other legislative reform.

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

The Spanish regulation on this issue is as follows:

- Productive autonomy of the transferred undertaking, business or part of company

Workers' Statute	Council Directive 2001/23/EC
Article 44.2: For the purposes of the provisions of this Article, it will be considered that there exists a transfer of business when the transfer **affects an economic entity which retains its identity in the sense of a group organized resources necessary to develop an economic activity, essential or accessory.**	**Article 1.** (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. (b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an **economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary**. (c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganization of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.

Article 44 ET, in its wording since 2001, captures perfectly the essential elements that in the EU regulation define the case of transfer of businesses, namely that the transferred entity maintains its own identity so as to allow for it to carry out an economic activity.

Obviously, there exist no problems when the object of transfer is an entire undertaking, business or company or a part of such, as the "productive autonomy of the transferred" is beyond doubt. The problem arises when the object of the transfer is a part of a workplace, an activity or production line that develops in part of a workplace. In these cases is when legal disputes emerge, which examine whether such transferred economic entity can by its self be exploitable in the market (that is, if it can carry out an economic activity).

At this point, it is important to note that the autonomy or exploitable character in the market of the transferred economic entity must be prior to the transfer, not existing a case of article 44 ET when such autonomy is only achieved after the transfer when joining other productive elements of the transferee, with which obtains the productive autonomy it lacked in origin (decision CJEU March 6, 2014, C. 458/12, case Telecom-Italia).

- Business transfer by express provision in collective bargaining agreement

In those activities where the relevant element lies primarily in the workforce (i.e. security, cleaning, maintenance, etc.), in Spain it is common for collective bargaining agreements, usually in the sector/industry level, to establish the new contractor to assume all or part of the outgoing contractor's employees, in the case of change in the contractor providing the service (i.e. security, cleaning, maintenance, etc.) for another company (leading business).

In this case, unlike what happens in the cases of business transfer as a result of a transfer of a group of workers (next section), Spanish courts have accepted that the collective bargaining agreement can set the percentage of workers affected by the transfer and, thus, by this guarantee of maintenance of their employment. In the sense that, if the collective agreement establishes that the new contractor must assume, for example, 80% of the outgoing contractor's workers of the transferred business, the remaining the 20% of workers cannot exercise a judicial action claiming the right to be hired by the new contractor.

- Business transfer by transfer of a group of workers: configuration and percentage of the assumed workforce

Notwithstanding that neither the EU Directive 2001/23/EC nor article 44 ET regulates the case of business transfer by transfer of a group of workers, it is widely known that, both in the EU and state level, this is one of the most controversial issues.

In summary, both the European Court of Justice and the Spanish Supreme Court are admitting that the legal consequences of transfer of businesses (maintenance of employment and working conditions and joint liability of the transferor and transferee regarding labor debts prior the transfer –Q3 to Q8–) are also applicable when the new contractor assumes all, most or a qualitatively substantial part of the outgoing contractor's employees. However, this rule only applies in relation to labor intensive activities; that is, in those activities where the relevant item resides primarily in the workforce (i.e. security, cleaning, maintenance, maintenance of computer systems, etc.) and, in addition, there is no express provision regarding this matter in the collective bargaining agreement (that is, when it is not a case of business transfer *ex* collective agreement, see previous section).

In other words, the legal consequences of transfer of businesses will not be applicable when the new contractor assumes all, most or a significant part of the outgoing contractor's workforce in the context of an economic activity which its main asset does

not lie in the workforce, but in equipment or infrastructure that has not been subject of the transfer.

Undoubtedly the most controversial issue at the judicial level is none other than to determine what percentage of workers that, assumed by the new contractor in the context of labor intensive activities (i.e. security, cleaning, etc.), leads to the existence of a «transfer of business».

Well, in Spain, at the judicial level there is no clear statement about the necessary minimum percentage, however when faced with high percentages of workers of the transferor being hired by the transferee (70-80%), courts estimate there is a case of «transfer of business» of article 44 ET (Spanish Supreme Court's decision of December 7th, 2011 (RJ 2012/106)). Nonetheless, there are judicial rulings that declare the existence of a transfer of business even when the percentage is under 50% but the transfer affects key workers for the transmitted activity (Supreme Courts' decisions of July 9th, 2014 (RJ 2014/4637), January 25th, 2006 (RJ 2006/4339), decision of the Court of Justice of Andalucía of May 10th, 2012 (JUR 2012/240509) or Castilla y León of May 2nd, 2012 (AS 2012/1145), among others).

Finally, the transfer of businesses by transfer of a group of workers implies two consequences:

- The legal consequences provided for in article 44 ET apply (see Q3 to Q8).
- In case the transferee hires only a part of the transferor's workers (even when majority), the workers assigned to the transmitted activity that weren't given the opportunity to become part of the transferee's workforce may take legal action against the transferee requesting (i) either the consideration of their dismissal by the transferor/transferee as an illegal dismissal (see next section) or (ii) to become part of the transferee's workforce.

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

No. In the Spanish legal system, in general, the answer is negative. However, in our opinion, this is one of the most controversial aspects regarding the correct normative and judicial interpretation of the provisions of the EU Directive.

Indeed, although article 4 of the Directive and article 44.1 ET clearly and expressly establish that the transfer of a business cannot itself constitute grounds for dismissal for the transferor nor the transferee, the fact is that –all but exceptional cases we will

analyze immediately after– Spanish courts have, untill very recently, qualified this dismissal as unfair (*despido improcedente*) and not null. Therefore, allowing the employer to opt between the worker's reinstatement or the termination of the employment contract with compensation that would normally be equivalent to 33 days of salary per year of service with a maximum of 24 monthly payments.

However, as mentioned, in 2014 we had a relevant decision by the Spanish Supreme Court that introduced the possibility of declaring these dismissals as null (= worker's reinstatement) on grounds of *fraus legis*. In particular, the Spanish Supreme Court's decision of February 18th, 2014 (case SODEOIL; RJ 2014/2769) declares null the collective dismissal carried out by the transferor prior the business transfer, with only 15 days between the communication of the company's unilateral decision to precede with the redundancy and the effectiveness of the transfer of the company. The Spanish Supreme Court concluded that in the examined case there was transfer of businesses, as SODEOIL fired its workers through a collective dismissal so as to achieve a transfer of the company without the labor consequences, thus benefiting the transferee (CAMPSARED). The former immediately assumed all economic and material elements of the service station necessary for its operation and economic exploitation, but not the workers who had previously been dismissed without justification and with obvious *fraus legis*, having the purpose to avoid the labor consequences of the transfer of businesses.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

Yes, although it either requires (i) agreement on such modification with workers' representatives and always after the effective incorporation of workers to the transferee's company or (ii) the adoption of a new collective bargaining agreement by the transferee.

Thus, under article 44.4 ET and consistent with the provisions of the first paragraph of article 3.3 of the Directive, the regulation in collective agreement of labor conditions can only be modified by agreement between the parties, when the collective agreement loses its validity for having reached the expiration date or as a result of the adoption of a new collective agreement that is applicable. In any case, this modification can only be done when collectively agreed and once the transfer is effective, never prior to it (decision of the Labor Court nº 33 of Barcelona of March 18th, 2014 (case BANKIA; JUR 2014/189927)).

In cases of collective bargaining agreements in a situation of extended validity (*ultraactividad*; that is, when the collective agreement has been rescinded but it is still valid), the doctrine is clear and precise: both the European Court of Justice in its recent judgment of September 11th, 2014 (TJCE 2014/220) and the Spanish Supreme Court (decisions of March 22nd, 2002 (RJ 2002/5994) and April 12th, 2011 (RJ 2011/3823)) state that the collective bargaining agreement is still applicable.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

Yes and in no case does the law require reaching an agreement with workers' representatives. The only requirement is to substantiate a consultation and negotiation period with workers' representatives that must be developed in good faith, but without requiring the parties to achieve an agreement to carry out a substantial modification of working conditions when these conditions are not regulated in a collective bargaining agreement.

In relation with the modification of working conditions not established in the collective bargaining agreement, the regulation is contained in paragraph 9 of article 44 ET, which transposes article 7.2 of the Council Directive 2001/23/EC. This legal provision establishes that when the transferor or transferee foresees to adopt labor measures (i.e. any modification of the employment relationship) as a result of the transfer in relation to their employees, it is mandatory to initiate a consultation period with the workers' representatives in sufficient advance prior the effectiveness of such modifications. The legal reference to "in sufficient advance" could be specified to 15 days, similar to the regulation in other collective bargaining processes of the modification, suspension or termination of the employment contract. In case of collective geographic mobility and substantial modification of working conditions, this article 44.9 ET expressly refers to the procedures for these modifications established in article 40.2 and 41.4 ET, respectively (in regard to articles 40 and 41 ET, see the Comparative Labor Law Dossier published in IUSLabor 3/2014).

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

Paragraph 1 of article 44 ET imposes the maintenance of all labor and Social Security conditions, including pension commitments.

The Act on Plans and Pension Funds (Royal Legislative Decree 1/2002 of November 29th) regulates, in its article 5.4.f), the consequences of dissolution by merger or transfer of the pension plan sponsor, in which case the transferee must subrogate to the transferor's pension plan and, when applicable, adapt it to its own pension plan within 12 months.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

Yes. In accordance with article 3.1 of the Directive, paragraph 3 of article 44 ET establishes joint liability of the transferor and transferee for three years after the transfer regarding labor debts prior the transfer and that had not been satisfied.

The first conclusion we can derive from this regulation is that the concept «labor debt» is broad and covers salaries, economic compensations, most beneficial conditions, etc.

With respect to terminations prior the business transfer and the later legal qualification of this termination (null or unfair), the conclusion reached by Spanish courts is that the transferee is who should bear the consequence of such qualification, notwithstanding that the contract between the two companies establishes the possibility of the transferee to claim the transferor compensation for having borne such consequences or that the price of the transfer already took into account this liability.

The transferee also subrogates to all Social Security debts of the transferor. This liability remains during three years, during which the transferee will be held liable for all debts, including infracontribution (articles 104 and 127 of the Social Security Act (Royal Legislative Decree 1/1994, June 20th; LGSS, hereinafter)). The transferee is liable for prior infracontributions. However, the transferee will not be liable for Social Security benefits caused after the transfer (decision of the Spanish Supreme Court of January 23rd, 2007 (case IKASTOLA IZARRAIZPE; RJ 2007/1908) and of the Court of Justice of the Basque Country of March 16th, 2010 (case ASOC. HONDARRIBIKO-TALAIA; JUR 2010\406340).

Finally, with respect to the singular institution –characteristic of the Spanish legal system– of the surcharge of Social Security benefits (article 123.3 LGSS), the Spanish Supreme Court has recently concluded that the transferee's liability doesn't include this surcharge on Social Security benefits (decision of the Spanish Supreme Court of October 28th, 2014 (case ACEROS LLODIO; RJ 2014/5849).

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

Yes, in general, this is the case.

In accordance with article 6 of the Council Directive, article 44.5 ET provides that when the undertaking, business or production unit that is object of the transfer preserves its autonomy, the change of ownership of that undertaking, business or production unit does not itself extinguish the term of the workers' representatives, who maintain their status as workers' representatives and remain exercising their representative functions under the same conditions.

Thus, only when the object of the transfer is not an entire company or work center, but a production unit that loses its autonomy after the transfer (that is, part of a work center), workers' representatives lose their status; allowing for, in this case, the possibility to hold union elections in the company of the transferee as a result of an increase of its personnel (article 67.1 ET) (decision of the Spanish Supreme Court of July 23rd, 1990 (case INDRA; RJ 1990/6453)).

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

Yes. In accordance with that established in article 7 of the Directive 2001/23/EC, paragraph 6 of article 44 ET provides the information and consultation obligations of the transferor and transferee.

- Information obligations

Workers' representatives have the right to be informed prior to the transfer regarding the following:

a) Expected date of the transfer.
b) Reasons that justify or motivate the transfer.
c) Legal, economic and social consequences for workers as a result of the transfer.
d) Measures envisaged for workers.

If in the company there are no workers' representatives, this information must be provided to all employees likely to be affected by the transfer (article 44.7 ET, which transposes article 7.6 of the Directive).

Non-compliance with these information obligations is sanctioned, in the Spanish legal system, with an economic fine (uninsurable) ranging between 626 and 6,250€ (article 7 sections 5 and 7 of the Infractions and Sanctions in the Social Order Act (Royal Legislative Decree 5/2000, August 4th; LISOS, hereinafter)).

- Consultation obligations

According to article 64.5 ET, workers' representatives, both of the company of the transferor and the transferee, are entitled to issue a preliminary report in cases of "*merger, takeover or modification of the company's legal status that involve any affectation to the level of employment*".

In the same sense as with respect to the breach of the information obligations, the Spanish legal system only establishes an economic sanction (uninsurable) for breach of these consultation obligations: serious infraction *ex* article 7.7 LISOS that leads to a fine ranging between 626 and 6,250€.

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?[2]

Although article 5.1 of Directive 2001/23/EC allows member states to exclude the provisions of transfer of businesses when the company in question is in bankruptcy proceedings aimed at liquidating all its assets, the Spanish legislator has not used this exclusion; rather the opposite.

In this sense, the current article 146 bis of the Bankruptcy Act (Law 22/2003 of July 9th; LC, hereinafter) provides that the transfer of a production unit in bankruptcy produces the labor effect of a transfer of businesses (article 44 ET) for those employment contract in force at the time of the transfer and assigned to the transferred productive unit.

As for the recurring question about whether the transferor's Social Security debts are transmitted to the transferee, the Royal Decree-Law 11/2014, of September 5th, on urgent measures in bankruptcy has introduced a very important modification in article 149.2 LC, adding labor "*and Social Security*" debts for the purpose of a transfer of a productive unite in bankruptcy. Thus, it appears that the legislator's intervention has settled the existing judicial dispute regarding this issue, accepting the approach advocated by the General Treasury of the Social Security (TGSS, hereinafter) in favor of the subrogation of the transferee in the debtor's position.

[2] The answer to this question has been elaborated based on the materials prepared by the PhD student Jennifer BEL ANTAKI.

However, as the Mercantile Judges gathered in Granada October 15-17th of 2014 had occasion to specify, this subrogation will only occur with respect to debts related with the workers assigned to the transferred production unit, so it will be possible to request the TGSS the due individualization and, by extension, the bankruptcy judge.

Finally, in relation to wage debts, article 149.2 LC states that the only debts that the bankruptcy judge can restrict are the wage and compensation debts assumed by the Wage Guarantee Fund (FOGASA) in accordance and within the limits established in article 33 ET; namely: 120 days of salary debts (6,010.80€ per worker) and an annuity for compensation debts (18,282.85€ per worker).

11. Other relevant issues regarding transfer of businesses

In the Spanish legal system there is a very important specialty in relation to business transfers with respect to senior managers.

In this sense, senior managers have the right to terminate their employment contract when affected by a transfer of business. They have three months to exercise their right of termination and during this period they retain the right to obtain the economic compensation established in the contract or in the legal regulation: 7 days of salary per year of service, with a maximum of 180 days' salary (article 10.3.d) of the Royal Decree 1382/1985, of August 1st, on the special employment relationship of senior management.

SUCCESSION AND TRANSFER OF BUSINESSES IN THE UK

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Introduction

The UK initially regulated the position of succession and transfer of businesses through the Transfer of Undertakings (Protection of Employment) Regulations 1981, which transposed into UK law the 1977 Acquired Rights Directive. This piece of legislation was later repealed and replaced by the Transfer of Undertakings (Protection of Employment) Regulation 2006 (hereinafter, TUPE 2006), which updated the UK's protection in light of the updated Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

This effectively ensures that the rights and obligations of employment transfer when a relevant transfer takes place, with special provision made for companies that are insolvent, with the unfair dismissal system offering protection against dismissals that are as a direct result of a transfer (unless in certain accepted situations).

1.b. What is the national law that implements the Council Directive 2001/23/EC?

The obligations contained within Directive 2001/23/EC are currently implemented in the UK through the Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereinafter TUPE 2006). TUPE 2006 were updated and amended in 2014 by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014.

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

Protection under the UK's TUPE 2006 is dependent on the existence of a 'relevant transfer', which is considered across two different situations:

1. Transfer of an undertaking, business or part of an undertaking or business (Regulation 3(1)(a) TUPE 2006)
2. Service Provision Change (Regulation 3(1)(b) TUPE 2006).

1. Standard relevant transfer

The position where the entire business is being transferred does not generally cause any problem in practice. The key question is whether the business is retaining its identity after the transfer. Accordingly, a test that has developed in this respect is whether the essential business activity is carried on by the new owner (see Kenny v South Manchester College [1993] IRLR 265). Factors to be considered include:

- Nature of the undertaking concerned, in particular whether it is labour intensive or asset-reliant.
- Whether tangible assets were transferred.
- The value of intangible assets at the time of transfer, and whether these are being transferred.
- The extent of employee transfers.
- Whether customers or customer goodwill was transferring.
- The degree of similarity of the business post-transfer with that pre-transfer.

Transfers of part of a business are also covered, so long as it is a recognized and identifiable part of the business as a whole. In such circumstances, in line with the ECJ decision in case 186/83 *Botzen* [1985] ECR 519, employees assigned to this part of the business will be transferred. Such a question is a question of fact.

2. Service provision change

A service provision change is defined as covering three categories:

- Activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
- Activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
- Activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf

This covers situations described as first generation contracting out, second generation contracting out, as well taking services back in-house from a previous outsourced position.

Where the transfer is based on service provision change, there a number of condition, in addition to satisfying the above definition, that need to be satisfied, before it will be considered to be a relevant transfer for the purposes of attracting transfer of undertakings protection. These are listed at Regulation 3(3), and cover:

(a) …immediately before the service provision change—
  (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
  (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

The focus under this form of transfer is on the activity itself rather than on the economic entity, as required under the standard transfer situation, discussed above.

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

Regulation 7 of TUPE 2006 explains the legal position where a transferring employee is dismissed for a reason connected to the transfer, it being stated that:

> Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—
> (a) The transfer itself; or
> (b) A reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

This indicates that any such dismissal, unless an economic, technical or organizational reason exists (considered below), will be automatically unfair.

Lord Slynn answered the question concerning whether such a dismissal would be considered null and void when giving judgment in *Wilson v St Helen's BC* [1999] 2 AC 52, when he observed that:

> "[Regulation 7 of TUPE 2006 seems] *to me to point to the dismissal being effective and not a nullity. If there is no dismissal there cannot be compensation for unfair dismissal. It is because the dismissal is effective that provision is made for it to be treated as unfair for the purposes of awarding compensation under employment legislation* […] *It follows in my opinion that under the Regulation the dismissals are not rendered nullities; nor is there an automatic obligation on the part of the transferee to continue to employ –to find work for– the employees who have been dismissed*."

Consequently, dismissals of affected employees for reasons connected to a transfer will not be null and void. Instead they will be considered unfair dismissals.

The position regarding dismissals for a reason connected to the transfer but which are made for an ETO reason will also be considered under the unfair dismissal regime. Regulation 7(2) TUPE 2006 provides that such dismissals, where the ETO entailed a change in the workforce of either the transferor or the transferee, will be treated as either being for redundancy reasons, or a dismissal for some other substantial reason, both of which require the transferee to establish that dismissing for that potentially fair reason was actually fair; this also introduces the need to follow a fair procedure.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

The position concerning collective bargaining agreements upon a relevant transfer was subject to change under the recent 2014 Regulations, noted above.

The general position is that collective agreements made between the transferor with a recognized trade union in respect of employees that are to be transferred, which are in existence at the time of the transfer, will be transferred and have effect as if the transferee was party to the agreement. This is contained at Regulation 5 of TUPE 2006. The rights contained within these collective agreements are therefore protected; however, any rights contained within collective agreements that have not yet come into force at the date of transfer, according to Regulation 4A TUPE 2006, will not transfer and have effect, unless the transferee is a party to the collective agreement (this is a new

insertion into TUPE 2006 and reflects the position following the CJEU's decision in Case C-426/11 *Alemo-Herron v. Parkwood Leisure Ltd*).

Variations of terms contained within collective bargaining agreements are dealt with by Regulation 4(5B) TUPE 2006. This provision allows transferees to renegotiate such terms, so long as the variation takes effect more than one year after the date of transfer, and the positions following variation does not introduce less favourable terms and conditions for the employee. This provision only applies to transfers that have taken place after 31 January 2014.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

The general position in the UK is that any modifications of the employment contract outside of a collective agreement that has a causative link to the transfer, or is for a reason connected to the transfer will be void pursuant to regulation 4(4) TUPE 2006, unless it is established that the modification is for an economic, technical or organizational reason (ETO). In circumstances that an ETO is established the employer and employee are either free to reach a bilateral agreement to change the terms and conditions (Regulation 4(5)), or alternatively the employer can invoke a contractual term, should one exist, enabling such modification. In other words, the employer is not able to unilaterally vary the terms and conditions of the contracts of affected employees. This effectively mirrors the seminal decisions by the ECJ of *Foreningen af Arbejdsledere I Danmark v. Daddy's Dance Hall A/S* [1988] IRLR 315 and *Rask and Christensen v. ISS Kantineservice A/s* [1993] IRLR 133.

It has been accepted that variations that are to the benefit of the employee will not be held to be void (*Regent Security Services Ltd v. Power* [2007] IRLR 226).

An understanding of the ETO reason is, as intimated above, crucial for determining when variations to the terms and conditions of an affected employee can be made and when a transferred employee can be dismissed. The concept, although appearing to be theoretically very wide, is generally restricted in practice. Government guidance, through DBIS, indicates that:

- Economic reasons relate to the profitability or market performance of the transferee's business
- Technical reasons relate to the nature of the equipment or production processes
- Organizational reasons relate to the organizational or management structures.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

The position with regards pensions on transfer is dealt with at Regulation 10 of TUPE 2006, which indicates that occupational pension schemes are not transferred. This is explained on two grounds: firstly, it is not based on contractual agreement, but is a creature of statute, and, secondly, it was initially outside the scope of the Acquired Rights Directive; however, although this is the general position, s.257 of the Pensions Act 2004 does make it clear that on a relevant transfer, affected employees who are currently a member of a scheme operated by the transferor, must ensure that the transferred employee is made eligible to join a scheme operated by the transferee or a stakeholder agreement. This is further expressed under the Transfer of Undertakings (Pension Protection) Regulations 2005, which provides that the minimum a transferee is obliged to do is to match the employee's contribution, up to a maximum of 6% of salary into the alternative.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

The transfer of liabilities in the UK is dealt with by Regulation 4 of TUPE 2006; with regulation 4(1) providing that the contract of employment "…*shall have effect after the transfer as if originally made between the person so employed and the transferee*". This is further complemented by Regulation 4(2) which states that on completion of the transfer "…*all the transferor's rights, powers, duties and liabilities*" will be transferred to the transferee.

What this all means is that there is automatic transfer of all existing terms and conditions of employment, along with any accrued rights and liabilities, which will include matters such as continuous service, which is important in the context of a number of UK statutory employment rights such as redundancy. Thus liabilities concerning salaries and economic compensations are covered and transferred.

An important obligation is placed on the transferor with respect existing liabilities, with the transferor obliged to notify the transferee as to his rights, duties and liabilities under or in connection with the employment contract of any employee being transferred pursuant to Regulation 11 and 12 of TUPE 2006. This will include:

- The identity and age of the employee
- Information contained within their statutory statement of employment particulars

- Information relating to any formal disciplinary action or grievances that have been raised in the previous two years
- Information of any court or tribunal case, claim or action brought by an employee against the transferor, within the previous two years or that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and
- Information of any collective agreement which will have effect after the transfer.

There is further requirement to provide information on any employee who has been unfairly dismissed because of the transfer. In circumstances where there is an unfair dismissal in connection with the transfer the affected employee's right of action will lie against the transferee, as was held by the EAT in *Allen v. Stirling DC* [1994] ICR 434; as this is a liability which transfers.

The employee liability information should contain reference to a date at which the information is up to date, which is not to be more than 14 days before the date on which the transferee is to be provided with it (which in general is not less than 14 days before the relevant transfer).

There is an exception to the transfer of liabilities position outlined above, this being in relation to relevant debts owed to the relevant employees in circumstances of insolvency of the transferor. Such debts will not transfer to the employee but will be met by the Secretary of State.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

The UK's TUPE 2006 is quiet on the position of workers' representatives post-transfer, and as such their position of continuing as such is unclear.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

A duty to inform and consult with employee representatives exists pursuant to regulation 13, 15 and 16 of the TUPE regulations. The duty is imposed on both the transferor and transferee employee. Unlike the position that existed under the 1981 Regulations the transferor and transferee will be jointly and severally liable to pay compensation should there be a failure to comply with this obligation.

"Appropriate representatives of any affected employees" is defined at Regulation 13(3) to cover representatives from a recognized trade union, or representatives that have been appointed or elected by the affected employees, either for this purpose or other purposes, so long as they have authority to receive information and consult about the transfer on the affected employee's behalf. However, if the affected employees fail to elect appropriate employee representatives then the employer is obliged to provide information direct to each of the affected employees, this position being reflected in Regulation 13(10) and 13(11) TUPE 2006.

Regulation 13(1) TUPE 2006 defines an "affected employee" widely to not only mean employees that are being transferred alongside the business, but also includes any other employees, of wither the transferor or the transferee, who may also be affected by any measures that are taken in connection to the transfer.

There is special provision, under Regulation 13A TUPE 2006, which enables direct information and consultation with employees in micro-businesses: this will apply to businesses with fewer than 10 employees, where there are no appropriate representatives, and affected employees have not been invited to elect representatives.

- Information obligations

Workers' representatives have the right to be informed prior to the transfer regarding the following:

(a) The fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
(b) The legal, economic and social implications of the transfer for any affected employees;
(c) The measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be taken, that fact; and
(d) Where the employer is the transferor, the measures in connection with the transfer he envisages the transferee will take in relation to any affected employees who will become employees of the transferee, or, if he envisages no such measures will be taken, that fact.

This information is to be provided "*long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees*". Interestingly, it has been suggested that this does not strictly introduce a statutory requirement to consult but only to provide information; however,

the reality has been interpreted by case law, including *Cable Realisations Limited v GMB Northern* [2010] IRLR 42, to ensure information is provided in good time to enable voluntary consultation to take place, which in practice requires the employer to consult with affected employee representatives "*as soon as reasonably practicable after the election of the representatives*". The Regulations are quite on any timetable for the information and consultation process.

- Consultation obligations

According to Regulation 13(6) TUPE 2006, an employer of an affected employee who envisages that he will take measure in relation to a transfer that impact upon that employee will consult with the appropriate representatives, with the aim of reaching an agreement on the measures to be adopted. There is a clear need, pursuant Regulation 13(7) to at least consider representations forwarded by employee representatives, with a need to formally reply to them, with reasons attached should the representations be rejected.

- Remedies

Regulation 15 TUPE 2006 provides the Employment Tribunal powers to make an order of declaration and an order for compensation where there has been a failure to inform or consult.

Where there has been a complaint of a failing in this regard, and it is accepted by the Employment Tribunal then it must make a declaration reflecting this, before turning to consider its discretionary power in relation to compensation.

Regulation 16(3) provides the position that, in addition to a declaration, the Tribunal may award "appropriate compensation", which is defined as "…*such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty*".

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

The 1981 Regulations were unclear on the position of insolvent employers; however, this was clarified by TUPE 2006. Regulation 8(7) brought into effect the derogation contained within Article 5(1) of Directive 2001/23/EC, which enabled the exclusion of

the provisions of transfer of businesses when the company in question is in bankruptcy proceedings or analogous insolvency proceedings.

Regulation 8(7) TUPE 2006 provides that:

> "*Regulations 4* [transfer of employment contracts and liabilities] *and 7* [control of dismissals of employees because of relevant transfer] *do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.*"

This means that the protections will not apply where there are insolvency situations, such as compulsory liquidations, where the purpose is to bring the business to an end; however, conversely, the protections will apply where the purpose of the liquidation is to rescue the business (as was considered to be the correct position by the Court of Appeal in *Key2Law (Surrey) LLP v De'Antiquis* [2011] EWCA Civ 1567).

SUCESIÓN Y TRANSMISIÓN DE EMPRESAS EN CHILE

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Introducción

En la medida en que se ha producido en el caso chileno una reducción de la participación del Estado en la economía –salvo en el caso de la gran minería del cobre–, resulta entendible que en la realidad económica chilena la sucesión de empresas sea un fenómeno habitual. Fenómeno societario, que no obstante, influye y forma parte de las vicisitudes de la relación laboral, poniendo en jaque el principio protector y su manifestación a través de la regla de la continuidad de las relaciones laborales.

La legislación del trabajo en Chile, no obstante el fuerte proceso flexibilizador de los años setenta, hubo de reconocer estos procesos y de disponer las normas de tutela que permitieran proteger la continuidad de las relaciones de trabajo más allá de los cambios en la titularidad de las empresas, lo que es relevante por las bajas tasas de sindicalización y de negociación colectiva, y en consecuencia, de probabilidades de tutela sindical.

1. a. ¿Existe en el ordenamiento jurídico de Chile una regulación específica sobre los derechos de los trabajadores afectados por un fenómeno de sucesión de empresa? En caso afirmativo, ¿esta norma es el resultado de algún convenio o pacto supranacional?

En Código del Trabajo chileno en su artículo cuarto consagra la norma que regula la vigencia de los derechos laborales en el caso de la sucesión de empresas.

Esta norma importa la aplicación del principio de continuidad, en cuanto no se produce efecto jurídico alguno al régimen laboral de los trabajadores, por las posibles modificaciones en la propiedad o tenencia del empleador, tanto en sus aspectos individuales como colectivos.

La norma establece lo siguiente:

> "*Las modificaciones totales o parciales relativas al dominio, posesión o mera tenencia de la empresa no alterarán los derechos y obligaciones de los*

> *trabajadores emanados de sus contratos individuales o de los instrumentos colectivos de trabajo, que mantendrán su vigencia y continuidad con el o los nuevos empleadores*."

Los términos de la protección son amplios, por cuanto el legislador señala que cualquier modificación, sea total o parcial sobre el dominio, posesión o mera tenencia de la empresa, no altera los derechos y obligaciones de los trabajadores, manteniendo por tanto, el contrato su vigencia y los derechos su continuidad.

El legislador parte del supuesto que el mero acto traslaticio de dominio constituye al adquirente en empleador, sin la necesidad de celebrar un nuevo contrato individual de trabajo o de nuevos instrumentos colectivos, y que el contenido de la relación de trabajo ya viene delimitado por los contratos de trabajo vigentes con el empleador primigenio.

La sola circunstancia de producirse esa modificación, coloca al adquirente en la calidad de empleador, aunque se debe distinguir si la modificación es total o parcial.

- Si se trata de una modificación total en el dominio, posesión o mera tenencia, es que la titularidad de la empresa se ha modificado y en consecuencia, se produce una plena identidad entre la empresa y su titular, y en consecuencia, del empleador.

- Si en cambio, la modificación es parcial, puede darse distintas situaciones. Una es que se mantenga la titularidad de la empresa, en cuyo caso sigue siendo la misma sin que se altere nada.

  Otra es que la modificación al dominio, posesión o mera tenencia consista en un acto traslaticio del centro de trabajo o de una de sus unidades, las que en consecuencia, dejan de formar parte de esa universalidad jurídica, en cuyo caso entonces se estará a lo que sea su destinación, sea que se incorpore a otra empresa o bien que se constituya en una empresa autónoma. En todos estos casos la norma tiene plena vigencia, aun cuando existe también en ellos una sustitución del empleador. No es un proceso que se produzca con frecuencia. Con todo, es evidente que se pueden producir en tales casos, modificaciones también en el régimen de responsabilidad.

2. ¿Cuáles son los supuestos de hecho que configuran la situación de «sucesión de empresa»? ¿De qué manera se trata el fenómeno de la sucesión de empresa por previsión expresa en convenio colectivo? ¿Y la situación de sucesión de empresa por sucesión de plantilla?

En el caso chileno, el ámbito de la tutela legal queda expresado en la amplitud de la norma, sea que se trate de una modificación total o parcial en el dominio, posesión o mera tenencia. En consecuencia, la empresa tiene una implícita definición patrimonial fundada en la titularidad de la misma.

No se da en la experiencia chilena, la previsión contractual colectiva de tutela de derechos por cambios en el empleador. Probablemente por la existencia de la citada norma del artículo cuarto.

No es un tema en las negociaciones colectivas. Tampoco es frecuente que las modificaciones en la propiedad de las empresas, laboralmente se anuncien con anticipación.

Sin embargo, en los procesos de sucesión de empresas, es usual que se produzcan diversas situaciones vinculadas a ella, particularmente en la gran empresa.

Una es la realización del *due dilligence* de parte del adquirente, que le permite conocer el estado de la situación laboral y previsional y las obligaciones que de ella provienen.

Otra es la posibilidad de que se ofrezcan planes especiales de egreso u ofertas especiales de salida de los trabajadores de la plantilla con beneficios mejorados en el caso de terminación del contrato y otros adicionales.

Algunas veces lo que se trasmite es el "casco", es decir los recursos materiales de la empresa pero sin trabajadores, los que han sido finiquitados previamente, dejándose la posibilidad de que sea el nuevo dueño de las instalaciones el que contrate o recontrate a los trabajadores.

3. ¿Es nulo (readmisión como único efecto) el despido que tiene su causa en la sucesión de empresa?

No. En el ordenamiento jurídico chileno, la declaración de nulidad de un despido se acota a casos excepcionales como la tutela de la libertad sindical o del fuero maternal, así como respecto de los actos discriminatorios graves, por lo que no se aplica a los casos de despido por sucesión de empresas.

El ordenamiento jurídico chileno cuenta con un sistema causado de terminación del contrato de trabajo, establecido en los artículos 159, 160, 161 y 171 del Código del Trabajo.

En el artículo 161 se contempla una causal de índole económica u organizacional de terminación del contrato que es la de las necesidades de la empresa, que permite el término del vínculo laboral y obliga al pago de una indemnización equivalente a 30 días por cada año trabajado o fracción superior a seis meses, con un tope de 330 días de remuneración y de 90 UF en la base de cálculo. Los supuestos de hecho que fundamentan esta causal, obedecen a causas económicas u organizacionales de carácter objetivas que afectan al mercado o a la empresa internamente, tales como: los cambios en el mercado o la economía o la racionalización o modernización de la empresa, y que hagan necesaria la separación del trabajador.

La sucesión de empresa no cabe dentro de esta causal, y por ende, no es justa causa de término del contrato de trabajo, siendo declarado el despido como injustificado, indebido o improcedente y sancionando al empleador al pago de las indemnizaciones legales más un recargo según haya sido la causal que el empleador haya podido invocar.

Si se aplica en tales casos la nulidad del despido, cuando se trata de representantes sindicales o de trabajadores protegidos del fuero por maternidad.

4. ¿Se permite que la empresa cesionaria modifique las condiciones de trabajo de los trabajadores afectos a la sucesión cuando están reguladas en convenio colectivo?

El ordenamiento jurídico chileno establece expresamente en el inciso segundo del artículo cuarto del Código del Trabajo, que las modificaciones totales o parciales en el dominio, posesión o mera tenencia de la empresa no alterarán los derechos y obligaciones de los trabajadores emanados de sus contratos individuales o de los instrumentos colectivos de trabajo, que mantendrán su vigencia y continuidad con él o los nuevos empleadores. En consecuencia, aquellos derechos y obligaciones que tengan su fuente en un instrumento colectivo (contrato colectivo de trabajo o convenio colectivo de trabajo), se mantendrán vigentes con el nuevo empleador hasta que el instrumento colectivo expire.

Sin perjuicio de lo anterior, el artículo quinto del Código del Trabajo establece que el contrato individual o colectivo de trabajo se puede modificar, de común acuerdo, en todas aquellas materias en que las partes hayan podido convenir libremente. En este sentido, y según lo ha señalado el órgano administrativo competente, los efectos de

aquella modificación no podrán hacerse valer respecto de todos los trabajadores sujetos al contrato colectivo, sino sólo de aquellos que concurran con su voluntad al acto modificatorio.

En consecuencia, el cesionario podría modificar los derechos contenidos en un contrato o convenio colectivo pero siempre a condición de que obtenga el acuerdo de los representantes de los trabajadores que concurrieron a la celebración de dicho contrato.

Estas modificaciones no afectarán a todos los trabajadores que formen parte del contrato colectivo, sino sólo de aquellos que hayan concurrido con su voluntad, a celebrar la modificación del contrato colectivo. Podrán también las partes celebrar un nuevo convenio colectivo o contrato colectivo, entendiendo para el efecto, que los contratos originarios mantendrán su vigencia hasta la fecha de expiración (2 a 4 años).

5. ¿Se permite que se modifiquen las condiciones de trabajo de los trabajadores afectos a la sucesión cuando no están reguladas en convenio colectivo?

En el ordenamiento jurídico chileno, se establece que las partes podrán modificar sus contratos individuales y colectivos en todo aquello que hayan podido convenir libremente, con la sola condición, de que provenga de un acuerdo de las partes y la limitación, de que la modificación sólo tendrá efectos respecto a los trabajadores que hayan convenido expresamente en ella. Por otra parte, y en materia de sucesión, ya hemos señalado que la legislación asegura la vigencia de los derechos laborales provenientes de contratos individuales y colectivos, pese al cambio de titularidad de la empresa.

En consecuencia, el cesionario podrá modificar los derechos y obligaciones laborales sólo una vez adquirida la titularidad de la empresa, y por ende, asumido el rango de "empleador", y siempre requiriendo el acuerdo expreso de los trabajadores de consentir esa modificación.

No será necesario este acuerdo, en aquellas materias propias del ejercicio del *ius variandi*, por el cual el nuevo empleador podrá modificar unilateralmente el contrato de trabajo de sus dependientes en cuanto a la naturaleza de los servicios, el inicio de la jornada de trabajo o el lugar de prestación de servicios con los requisitos y limitaciones establecidas en el artículo 12 del Código del Trabajo.

6. ¿Qué sucede con los compromisos por pensiones que los trabajadores transmitidos tuviesen con la empresa cedente?

En Chile se contempla un sistema de pensiones basado mayoritariamente en la capitalización individual de fondos[3]. Estos fondos son descontados por el empleador de la remuneración mensual, y enterados en la administradora de fondos de pensiones a la que se encuentre afiliado el trabajador.

Ahora bien, para el caso que exista algún beneficio previsional pactado en un instrumento colectivo o en el contrato individual de trabajo, según lo dispuesto en el inciso segundo del artículo cuarto mantendrán su vigencia y serán exigibles al nuevo empleador.

7. ¿El empresario cesionario es responsable de las deudas laborales (salario, Seguridad Social…) que tuvieran los trabajadores afectados por la sucesión con el empresario cedente?

Sí, aún cuando existió una postura distinta por parte del órgano administrativo hace algunos años.

La doctrina administrativa anterior, reflejada en el Dictamen Ordinario Nº 2244 de 02/05/1984, sostenía que no resultaba jurídicamente posible interpretar el inciso segundo del artículo cuarto del Código del Trabajo como la imposición al empleador de la responsabilidad sobre las obligaciones laborales y previsionales que hubiere tenido el anterior titular de la empresa. Sin embargo, la Dirección del Trabajo modificó esta doctrina en el año 2005 con el Dictamen Ordinario Nº 0849/28, señalando que el inciso segundo del artículo cuarto del Código del Trabajo, fue concebido como una forma de protección de los derechos y obligaciones de los trabajadores que emanan de sus respectivos contratos individuales y colectivos frente a cambios en la titularidad de la empresa, por lo que es jurídicamente correcto asignar al nuevo empleador la responsabilidad de las obligaciones que tenía pendiente el anterior titular de forma directa.

A falta de norma expresa que lo haga responsable, se ha entendido que es responsable directamente de estas obligaciones, sin perjuicio de las acciones civiles que pueda detentar para el caso que éstas no hayan sido conocidas por el adquirente al momento del traspaso y no hayan, por tanto, sido consideradas en el precio.

[3] Cabe señalar que aún se encuentran vigentes algunos sistemas de pensión basados en el reparto, fundamentalmente respecto a trabajadores antiguos y fuerzas armadas.

8. Si entre los trabajadores afectados por la sucesión hay representantes de los trabajadores, ¿mantienen éstos su condición de representantes en la empresa cesionaria?

Sí, pese a que en nuestro ordenamiento jurídico los sindicatos son principalmente de empresa, las alternaciones en la titularidad de la empresa no afectan los derechos y obligaciones laborales, que tengan su fuente en contratos individuales o instrumentos colectivos.

En virtud de lo dispuesto en el inciso segundo del artículo cuarto del Código del Trabajo, se entiende que los derechos y obligaciones siguen a la empresa y no al empleador, por lo tanto subsisten con aquel que ha adquirido en propiedad, posesión o mera tenencia la empresa.

En consecuencia, los sindicatos presentes en la empresa cedida mantendrán su existencia mientras se mantengan los quórum requeridos por la ley para subsistir.

9. ¿Se prevén derechos de información y consulta para los trabajadores afectos a la sucesión y/o sus representantes legales en la empresa cedente y/o cesionaria? ¿Qué consecuencias se derivan del incumplimiento de dichos deberes de información y consulta?

No, no se prevén. Un proyecto de ley en trámite legislativo considera el derecho de información periódica, no solo en la negociación colectiva.

10. ¿Existe una regulación especial en caso de que la sucesión de empresa se lleve a cabo en un procedimiento concursal?

Con anterioridad a la Ley Nº 20.720 de 10/10/2014 que modifica la Ley de Quiebras, el legislador contemplaba la posibilidad de vender la empresa en quiebra como unidad económica (artículos 124 a 129 de la Ley de Quiebras) bajo ciertas condiciones especiales[4]. Lo anterior permitía la mantención de los contratos de trabajo de los trabajadores de la empresa vendida, permitiendo la plena aplicación de lo dispuesto en el inciso segundo del artículo cuarto del Código del Trabajo.

La modificación legal introducida en el año 2014 que sustituye el régimen concursal por una Ley de Reorganización y Liquidación de Empresas, incorpora una nueva causal de

[4] Los acreedores que reunieran más de la mitad del total del pasivo de la quiebra podrían acordar la enajenación de todo o parte del activo de la misma como unidad económica, en subasta pública ante el juez que conoce de la quiebra y al mejor postor

término del contrato de trabajo, y esta es: la resolución que declara la liquidación de la empresa. Esta declaración pone término justificado al contrato de trabajo, dando derecho al pago de las indemnizaciones legales por término de contrato.

Si bien la nueva regulación mantiene la figura de la "venta de la empresa como unidad económica", al ser ésta posterior a la declaración de liquidación, no tiene por efecto transferir en la venta de la empresa como unidad, los contratos individuales y colectivos de trabajo, y por ende, no genera la continuidad de la relación laboral que ya ha concluido con la resolución que declara la liquidación de la empresa.

SUCESIÓN Y TRANSMISIÓN DE EMPRESAS EN COSTA RICA

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Introducción

Tanto el artículo 37 del Código de Trabajo (CT, en adelante) como el artículo 30 de la Ley Constitutiva de la Caja Costarricense del Seguro Social (LCCSS en adelante), se refieren a los supuestos de sucesión y transmisión de empresas, con el único fin de proteger los derechos de los trabajadores.

El CT fue aprobado mediante Ley No. 2 del 27 de agosto de 1943 y la redacción del artículo 37 se mantiene incólume desde entonces. La LCSS fue aprobada por su parte, mediante la Ley No.17 del 22 de octubre de ese mismo año. Sin embargo, el texto que actualmente tiene el artículo 30 fue introducido mediante reforma aprobada por la ley No. 4189 del 10 de setiembre de 1968.

Si bien en la LCSS se hace referencia expresamente a la venta o arrendamiento de empresa, el CT sólo se refiere a la "sustitución", que puede entonces desarrollarse por cualquier medio lícito, siempre que implique un traslado de un "*derecho real o traslativo de dominio sobre los bienes*", lo que no se consigue con el simple arrendamiento (Res: 2009-00651, sala segunda de la Corte Suprema de Justicia. San José, a las nueve horas treinta y nueve minutos del veintinueve de julio del dos mil nueve).

1.a. ¿Existe en el ordenamiento jurídico de Costa Rica una regulación específica sobre los derechos de los trabajadores afectados por un fenómeno de sucesión de empresa? En caso afirmativo, ¿esta norma es el resultado de algún convenio o pacto supranacional?

Sí existe. Por un lado, el artículo 37 CT trata exclusivamente de la "sustitución del patrono". De otro, el artículo 30 LCSS se refiere a los supuestos de "traspaso" o "arrendamiento" de una empresa.

En ambos casos, el interés del legislador por regular la sucesión y transmisión de empresas de esta forma, busca asegurarse que las obligaciones que el empleador cedente mantiene con los trabajadores o las entidades de Seguridad Social, puedan exigirse tanto a él como al empleador cesionario.

Estas normas no tienen un origen convencional ni tampoco son fruto de convenios o pactos supranacionales. Si bien el país es parte del Sistema de Integración Centroamericana, no existen competencias legislativas que hayan sido delegadas a órganos supranacionales.

2. ¿Cuáles son los supuestos de hecho que configuran la situación de «sucesión de empresa»? ¿De qué manera se trata el fenómeno de la sucesión de empresa por previsión expresa en convenio colectivo? ¿Y la situación de sucesión de empresa por sucesión de plantilla?

Las normas relativas a la sustitución patronal para efectos del resguardo de los derechos laborales de los trabajadores, no detallan los supuestos de hecho del concepto genérico de sustitución patronal. Aunque un poco más concreto, en referencia a formas traslativas de dominio, como la venta o el arrendamiento, el artículo 30 LCSS no ofrece mayores detalles.

Ninguna de estas normas se refiere tampoco a los casos en los que tales figuras se relacionan no con la empresa en su totalidad sino con un centro de trabajo en particular; sin embargo, en tanto la persona del empleador se modifique, independientemente de la cantidad y el ámbito de trabajadores afectados, la regla sigue siendo la misma.

El fenómeno de la sucesión o transmisión de empresas no encuentra previsión expresa en los convenios colectivos de trabajo ni en los arreglos directos, las dos manifestaciones de la negociación colectiva más utilizadas en el país.

3. ¿Es nulo (readmisión como único efecto) el despido que tiene su causa en la sucesión de empresa?

El régimen de despido en el país es libre (artículo 63 de la Constitución Política), salvo en los casos en los que por ley, negociación colectiva o sentencia judicial, se haya establecido un régimen de estabilidad que exija el despido por justa causa. Tampoco existe una diferenciación entre las causas objetivas o subjetivas de despido.

La sucesión o transmisión de la empresa aunque puede estar asociada a cambios en la planilla por voluntad del empleador, tanto el que traslada como el que adquiere el dominio de la empresa, no da derecho al trabajador a exigir el rompimiento o extinción del contrato de trabajo con el pago de sus prestaciones laborales.

4. ¿Se permite que la empresa cesionaria modifique las condiciones de trabajo de los trabajadores afectos a la sucesión cuando están reguladas en convenio colectivo?

Ni los contratos de trabajo ni la negociación colectiva pueden ser modificados con motivo de la sucesión de empresas. En consecuencia, el contrato de trabajo solo podrá modificarlo el nuevo empleador, por medio de un acuerdo de partes y la convención colectiva de trabajo o el arreglo directo en cualquier momento por medio de una negociación en tal sentido o al vencerse el plazo de la misma, salvo que exista alguna cláusula que asegure la ultraactividad indefinida.

5. ¿Se permite que se modifiquen las condiciones de trabajo de los trabajadores afectos a la sucesión cuando no están reguladas en convenio colectivo?

Siempre y cuando se trate de temas no regulados en una convención colectiva de trabajo o en el arreglo directo, la modificación unilateral por parte del empleador de algunos elementos del contrato de trabajo, es posible dentro de los límites tradicionales del *ius variandi*. Por un lado, el cambio debe realizarse por una necesidad objetiva de la empresa, de otro, no puede causar un grave perjuicio patrimonial o moral al trabajador y finalmente, no puede afectar elementos esenciales del contrato de trabajo, los que han venido siendo definidos jurisprudencialmente, como es el caso del salario o la jornada de trabajo.

El cambio dentro de este contexto puede implementarse antes o después de la sucesión de empresas, por el anterior o nuevo empleador.

6. ¿Qué sucede con los compromisos por pensiones que los trabajadores transmitidos tuviesen con la empresa cedente?

En términos generales, la sucesión de empresas no puede perjudicar las condiciones de trabajo existentes con anterioridad, de modo que quedan allí comprendidas también las prestaciones complementarias por Seguridad Social a que tuvieran derecho los trabajadores y que les fueran reconocidas por el anterior empleador, de modo que el nuevo, deberá seguirlas cumpliendo mientras se mantenga el contrato de trabajo. En consecuencia, estos beneficios se mantendrían salvo que existiera un convenio que las modifique o extinga.

Sin embargo, los beneficios complementarios de Seguridad Social que la empresa haya pactado con las empresas terceras administradores de los mismos, si podrían establecer cláusulas de exclusión o terminación en supuestos de sucesión o transmisión de

empresas y exigir en consecuencia, la aceptación del nuevo empleador, para que ellas sigan concediéndose.

La validez de la condición extintiva de estas cláusulas dependerá del hecho de que al momento de la contratación, cuando los beneficios le sean ofrecidos al trabajador, se le haya informado suficientemente bien de esta circunstancia.

7. ¿El empresario cesionario es responsable de las deudas laborales (salario, Seguridad Social…) que tuvieran los trabajadores afectados por la sucesión con el empresario cedente?

El artículo 37 CT dispone que el empleador sustituido será directa y solidariamente responsable con el nuevo patrono por las obligaciones derivadas de los contratos o de la Ley, nacidas antes de la fecha de la sustitución y hasta por el término de seis meses. Concluido este plazo, la responsabilidad subsistirá únicamente para el nuevo patrono.

El concepto de "obligaciones" comprende cualquier derecho originado en la Ley, el contrato de trabajo, en la negociación colectiva o en una sentencia judicial o arbitral.

Adicionalmente, el artículo 30 LCSS establece una responsabilidad directa y solidaria entre el propietario de la empresa con el transmitente o arrendante, respecto del pago de las cuotas obreras o patronales, que como empleador se deban a la Caja Costarricense del Seguro Social a la fecha del traspaso o arrendamiento.

Los derechos protegidos en este caso, son tanto los provenientes del Seguro de salud, como los del Seguro de invalidez, vejez y muerte y los derivados de la Ley de Protección al Trabajador, entre los cuales destacan el Fondo de Capitalización Laboral y el Régimen Obligatorio de Pensión Complementaria.

El plazo de prescripción para el reclamo de los derechos laborales relacionados con el artículo 37 CT es de 1 año a partir de la extinción del contrato de trabajo (artículo 602 CT), por lo que mientras subsista la relación de trabajo, no inicia el cómputo del plazo.

En cuanto a las deudas en materia de Seguridad Social previstas en el artículo 30 LCSS, la acción para que el trabajador reclame el monto de la pensión es imprescriptible (artículo 44 LCSS) y es independiente de aquella que se establezca por parte de la Caja Costarricense del Seguro Social para demandar el reintegro de las cuotas atrasadas y otros daños y perjuicios ocasionados por el empleador, que es de 10 años (artículo 56 LCSS).

8. Si entre los trabajadores afectados por la sucesión hay representantes de los trabajadores, ¿mantienen éstos su condición de representantes en la empresa cesionaria?

En el supuesto de representantes sindicales, la posibilidad de mantener o no su condición dependerán de los propios estatutos de la organización, según la cantidad de trabajadores afiliados a la misma que finalmente se encuentren laborando con el nuevo empleador.

Respecto de los representantes libremente elegidos por los trabajadores o, en todo caso, no sindicales, si el traslado es solo de una parte de la empresa o del centro de trabajo, su condición se extingue en el nuevo lugar de trabajo, donde deberán nuevamente ser elegidos en ese cargo.

9. ¿Se prevén derechos de información y consulta para los trabajadores afectos a la sucesión y/o sus representantes legales en la empresa cedente y/o cesionaria? ¿Qué consecuencias se derivan del incumplimiento de dichos deberes de información y consulta?

Los derechos de información y consulta de los representantes de los trabajadores sólo se encuentran regulados por el ordenamiento jurídico costarricense, en la medida en que estén incluidos en el Convenio núm. 135 sobre los representantes de los trabajadores y la Recomendación núm. 143 sobre la protección y facilidades que deben otorgarse a los representantes de los trabajadores, ambos de la Organización Internacional del Trabajo, que han sido ratificados por el país, incluso en este último caso, que formalmente no debería haber sido susceptible de aprobación por la Asamblea Legislativa.

Las normas internacionales ya citadas no detallan el contenido de los derechos de información y consulta, especialmente en caso de sustitución, venta o arrendamiento de empresa; y aunque en el marco de aquellas normas, sería posible derivar ese derecho, todavía no existen antecedentes judiciales que puedan ser citados.

10. ¿Existe una regulación especial en caso de que la sucesión de empresa se lleve a cabo en un procedimiento concursal?

No existe ninguna regulación especial.

11. Otras cuestiones relevantes en materia de sucesión de empresas

En algunos casos de sucesión de empresas, suele presentarse la circunstancia de que tanto el antiguo empleador como el adquirente incluyen como parte de su negociación, la obligación de que antes de la sucesión o trasmisión de la empresa, se haga por parte del vendedor la comunicación de despido con responsabilidad patronal a los trabajadores y se proceda al pago de la totalidad de las prestaciones laborales que por Ley se le deben cubrir.

Este acuerdo procura que el empleador adquirente tenga la posibilidad de contratar nuevamente a estos trabajadores en condiciones laborales distintas a las anteriormente existentes, inclusive a la baja. Las condiciones más favorables podían haber estado incluidas en contratos individuales de trabajo o negociaciones colectivas.

Sin embargo, estas prácticas vienen suscitado en los últimos años algunos comentarios relevantes por la Sala Segunda de la Corte Suprema de Justicia. Así, por ejemplo, cuando estos despidos colectivos tienen por objetivo vaciar de contenido y ponerle fin a una convención colectiva de trabajo de forma unilateral, se ha considerado que existe una práctica laboral desleal, es decir, lesiva del derecho de libertad sindical (Res: 2006-00681. sala segunda de la Corte Suprema de Justicia. San José, a las nueve horas cuarenta y ocho minutos del cuatro de agosto del dos mil seis).

SUCESIÓN Y TRANSMISIÓN DE EMPRESAS EN MÉXICO

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Introducción

En el ordenamiento jurídico mexicano no se regula expresamente el supuesto de la sucesión de empresas y las consecuencias laborales que de ésta se derivan. Sin embargo, realizando un análisis jurídico, dentro de la legislación civil y mercantil se regula el supuesto de la sucesión o transmisión de una empresa, y por otra parte, la legislación laboral establece la figura de sustitución patronal que establece obligaciones y derechos entre el patrón y el trabajador al llegarse a presentar la sustitución.

¿Qué es la sucesión? En el derecho civil y mercantil mexicano una "*sucesión es el medio por el que una persona ocupa en derechos el lugar de otra, es decir, lleva implícita la sustitución de una persona, por cuanto a su titularidad de derechos y obligaciones, por otra que los adquirirá a falta de la primera*"[5]. En la sucesión se transmitirán bienes, derechos y obligaciones, en el caso mexicano, bienes, derechos y obligaciones de una persona que ha perdido su goce y disfrute a causa de la muerte (Libro Tercero. De las sucesiones; artículo 1281 en adelante del Código Civil Federal –CCF–). Existen dos tipos de sucesiones: a titulo universal (heredero) y a título singular (legatario).

Una vez comprendido el concepto de sucesión en el marco legal mexicano, es momento de dirigirnos al ámbito laboral. Por lo que nos preguntamos, ¿qué es la sustitución patronal? En síntesis podemos afirmar que la sustitución patronal o patrón sustituto se da cuando cambia la persona física o moral que utiliza los servicios de uno o varios trabajadores. Estableciendo la legislación laboral que no afectará dicha sustitución a las relaciones de trabajo[6].

> Sustitución patronal: cuándo opera
> "*Existe sustitución de patrón en relación con una unidad económica de producción, siempre y cuando haya íntima relación entre dicho fundo de trabajo y el patrono, sin interrupción de las actividades laborales de producción o servicios, esto es, cuando el patrono sustituto siga el desarrollo de las actividades del anterior, dentro del centro de trabajo, empleando la misma*

[5] PÉREZ CONTRERAS, M. M., *Derecho de familia y sucesiones*, IIJ-UNAM, México, p. 185.
[6] SÁNCHEZ-CASTAÑEDA, A., *Diccionario de Derecho Laboral,* Oxford, México, 2013, p. 118-119.

maquinaria y herramientas, ocupando ese local, manteniendo el mismo giro comercial, sosteniendo la misma productividad y siempre que no exista paralización de labores. En otros términos, debe entenderse que hay sustitución de patrono, no sólo cuando el que lo ha sido traspasa directa o indirectamente, mediata o inmediatamente su negocio a un tercero, sino que se requiere, como elemento esencial, la continuación de la empresa sin paralización de labores, y teniendo como fin la misma productividad y giro; de lo contrario, de existir previamente paralización de labores con motivo de haberse declarado rotas las relaciones de trabajo, como puede suceder después del estallamiento de un movimiento de huelga, en que los bienes de la empresa que se dice sustituida pasan mediante un remate a otra empresa, es claro que no se presenta la sustitución patronal contemplada legalmente." (Tribunal Colegiado en materia de trabajo del tercer circuito).[7]

1.a. ¿Existe en el ordenamiento jurídico de México una regulación específica sobre los derechos de los trabajadores afectados por un fenómeno de sucesión de empresa? En caso afirmativo, ¿esta norma es el resultado de algún convenio o pacto supranacional?

En México no existe un marco regulatorio especifico que establezca el fenómeno de la sucesión de empresa. Sin embargo, podemos acudir a diversas legislaciones que se ven involucradas en el tema; derecho civil, mercantil y laboral.

2. ¿Cuáles son los supuestos de hecho que configuran la situación de «sucesión de empresa»? ¿De qué manera se trata el fenómeno de la sucesión de empresa por previsión expresa en convenio colectivo? ¿Y la situación de sucesión de empresa por sucesión de plantilla?

La figura de la transmisión de empresa, tema que nos atañe, puede darse por diferentes vías[8]:

- Transmisión hereditaria: cuando el heredero o legatario adquiere bienes, derechos y obligaciones que le pertenecían a otra persona.

[7] Época: Novena Época. Registro: 198603.Instancia: Tribunales Colegiados de Circuito. Tipo de Tesis: Aislada. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo V, Junio de 1997. Materia(s): Laboral. Tesis: III.T.19 L Página: 786. Amparo en revisión 47/96. Luis Miguel Ramos Mena. 30 de abril de 1997. Unanimidad de votos. Ponente: Hugo Gómez Ávila. Secretario: Eugenio Isidro Gerardo Partida Sánchez.

[8] *Guía para la transmisión de empresas.* Consultado el 12 de marzo de 2015 en: http://www.ipyme.org/Publicaciones/Guia%20Transmisiones_VG_web.pdf

- Compra-venta: hay compra-venta (artículo 2248 CCF) cuando uno de los contratantes se obliga a transferir la propiedad de una cosa o de un derecho, y el otro a su vez se obliga a pagar por ellos un precio cierto y en dinero.
- Donación: es un contrato por el que una persona transfiere a otra, gratuitamente, una parte o la totalidad de sus bienes presentes (artículo 2322 del CCF).
- Hipoteca de empresa: es un derecho real que grava determinados bienes, sujetándolos a responder por el incumplimiento de una obligación.
- Adquisición de acciones o participaciones.
- Fusión: es una operación jurídica realizada entre dos o más sociedades orientada a la extinción de todas o de alguna de ellas y a la integración de sus respectivos socios y patrimonios en una sola sociedad ya preexistente o de nueva creación.
- Escisión: se divide total o parcialmente el patrimonio de una empresa para transmitir.

Sin embargo, como ya se ha mencionado dentro del ámbito laboral la única forma por la que se establecen obligaciones es en el caso de una sustitución patronal, en la que puede existir una transmisión de empresa. En México el contenido de un contrato colectivo[9] consta de los siguientes elementos:

> (i) Los nombres y domicilios de los contratantes; (ii) las empresas y establecimientos que abarque; (iii) su duración o la expresión de ser por tiempo indeterminado o para obra determinada; (iv) las jornadas de trabajo; (v) los días de descanso y vacaciones; (vi) el monto de los salarios; (vii) las cláusulas relativas a la capacitación o adiestramiento de los trabajadores en la empresa o establecimientos que comprenda; (viii) las disposiciones sobre la capacitación o adiestramiento inicial que se deba impartir a quienes vayan a ingresar a laborar a la empresa o establecimiento; (ix) las bases sobre la integración y funcionamiento de las Comisiones que deban integrarse de acuerdo con esta Ley; y, (x) las demás estipulaciones que convengan las partes.

En atención a los elementos podemos constatar que no existe una mención que obligue a los contratantes a establecer algo relativo al fenómeno de transmisión de empresa, por lo que se tendría que atender al principio de la sustitución patronal para el cumplimiento de las obligaciones laborales.

[9] Artículo 386 de la Ley Federal de Trabajo (LFT): contrato colectivo de trabajo es el convenio celebrado entre uno o varios sindicatos de trabajadores y uno o varios patrones, o uno o varios sindicatos de patrones, con objeto de establecer las condiciones según las cuales debe prestarse el trabajo en una o más empresas o establecimientos.

3. ¿Es nulo (readmisión como único efecto) el despido que tiene su causa en la sucesión de empresa?

En el ordenamiento laboral mexicano, no sería una causa de despido justificado, en razón a sucesión de empresa, ya que sólo la persona física o moral está adquiriendo los bienes, derechos y obligaciones que envuelven a la empresa, y dentro de esas obligaciones se encuentra la de dar continuidad a las relaciones laborales existentes.

La Ley Federal de Trabajo establece en su artículo 41 que en la substitución de patrón no afectará las relaciones de trabajo de la empresa o establecimiento. El patrón substituido será solidariamente responsable con el nuevo por las obligaciones derivadas de las relaciones de trabajo y de la Ley, nacidas antes de la fecha de la substitución, hasta por el término de seis meses[10]; concluido éste, subsistirá únicamente la responsabilidad del nuevo patrón.

4. ¿Se permite que la empresa cesionaria modifique las condiciones de trabajo de los trabajadores afectos a la sucesión cuando están reguladas en convenio colectivo?

En México no es posible la modificación de las condiciones de trabajo a unas menos favorables a las que establece el contrato o convenio colectivo[11], sin embargo si pueden ser modificadas por unas mayormente favorables.

La LFT establece que se puede dar la terminación de un contrato colectivo de trabajo: (i) por mutuo consentimiento, (ii) por terminación de la obra y (iii) en los casos del capítulo VIII de este Título, por cierre de la empresa o establecimiento, siempre que en este último caso, el contrato colectivo se aplique exclusivamente en el establecimiento (artículo 401).

> Artículo 402. "*Si firmado un contrato colectivo, un patrón se separa del sindicato que lo celebró, el contrato regirá, no obstante, las relaciones de aquel patrón con el sindicato o sindicatos de sus trabajadores*."

En los casos de disolución del sindicato de trabajadores titular del contrato colectivo o de terminación de éste, las condiciones de trabajo continuarán vigentes en la empresa o establecimiento[12].

[10] El término de seis meses a que se refiere el párrafo anterior, se contará a partir de la fecha en que se hubiese dado aviso de la substitución al sindicato o a los trabajadores.

[11] Artículo 394 LFT: "*El contrato colectivo no podrá concertarse en condiciones menos favorables para los trabajadores que las contenidas en contratos vigentes en la empresa o establecimiento*."

5. ¿Se permite que se modifiquen las condiciones de trabajo de los trabajadores afectos a la sucesión cuando no están reguladas en convenio colectivo?

La legislación laboral no establece específicamente si son modificables las condiciones de trabajo no reguladas en el convenio colectivo.

Sin embargo, se establece en el artículo 57 LFT que el trabajador podrá solicitar de la Junta de Conciliación y Arbitraje la modificación de las condiciones de trabajo, cuando el salario no sea remunerador o sea excesiva la jornada de trabajo o concurran circunstancias económicas que la justifiquen, y a su vez el patrón cuando concurran circunstancias económicas que la justifiquen.

6. ¿Qué sucede con los compromisos por pensiones que los trabajadores transmitidos tuviesen con la empresa cedente?

Los compromisos por pensiones serán ahora absorbidos por la empresa sucesora o sustituta.

La Ley del Seguro Social considera que hay sustitución de patrón cuando:

(i) Exista entre el patrón sustituido y el patrón sustituto transmisión, por cualquier título, de los bienes esenciales afectos a la explotación, con ánimo de continuarla. El propósito de continuar la explotación se presumirá en todos los casos; y

(ii) En los casos en que los socios o accionistas del patrón sustituido sean, mayoritariamente, los mismos del patrón sustituto y se trate del mismo giro mercantil[13].

En caso de sustitución de patrón, el sustituido será solidariamente responsable con el nuevo de las obligaciones derivadas de esta Ley, nacidas antes de la fecha en que se avise al Instituto por escrito la sustitución, hasta por el término de seis meses, concluido el cual todas las responsabilidades serán atribuibles al nuevo patrón.

El Instituto Mexicano del Seguro Social (IMSS) deberá, al recibir el aviso de sustitución[14], comunicar al patrón sustituto las obligaciones que adquiere conforme al

[12] Artículo 403 LFT.

[13] Artículo 290 de la Ley del Seguro Social (LSS).

[14] Es el aviso que debes presentar como patrón cuando sustituyas a otro ya registrado ante el IMSS, ya sea por compra-venta del centro de trabajo o por sustitución laboral. El aviso debe darse al Seguro Social para mantener actualizados los datos y todo cambio de actividad del registro patronal. Consultado el 10 de Marzo de 2015 en: http://www.imss.gob.mx/tramites/imss02002c

párrafo anterior. Igualmente deberá, dentro del plazo de seis meses, notificar al nuevo patrón el estado de adeudo del sustituido.

7. ¿El empresario cesionario es responsable de las deudas laborales (salario, Seguridad Social…) que tuvieran los trabajadores afectados por la sucesión con el empresario cedente?

Si, el empresario cesionario o empresa sucesora será responsable de las obligaciones que el sustituido tenía para con sus trabajadores. El patrón substituido será solidariamente responsable con el nuevo por las obligaciones derivadas de las relaciones de trabajo y de la LFT, nacidas antes de la fecha de la substitución, hasta por el término de seis meses[15]; concluido éste, subsistirá únicamente la responsabilidad del nuevo patrón.

Sin dejar de lado que el sustituido será solidariamente responsable con el nuevo de las obligaciones derivadas de la LSS, nacidas antes de la fecha en que se avise al IMSS por escrito la sustitución, hasta por el término de seis meses.

8. Si entre los trabajadores afectados por la sucesión hay representantes de los trabajadores, ¿mantienen éstos su condición de representantes en la empresa cesionaria?

La legislación laboral no establece específicamente respecto a la permanencia en los puestos de trabajo al darse una sucesión de empresa, sin embargo en cumplimiento a los derechos laborales contenidos en la LFT han de respetarse siempre y cuando no se incurra en alguna causa que involucre la separación del empleo.

9. ¿Se prevén derechos de información y consulta para los trabajadores afectos a la sucesión y/o sus representantes legales en la empresa cedente y/o cesionaria? ¿Qué consecuencias se derivan del incumplimiento de dichos deberes de información y consulta?

El artículo 41 LFT establece que debe existir un aviso de la sustitución patronal a los trabajadores o al sindicato de la empresa. De ello se deriva que la propia Ley impone a los patrones la obligación de dar el aviso correspondiente, a fin de contar con una fecha cierta para el cómputo del plazo respectivo que sirve para fijar el inicio y término de la

[15] El término de seis meses a que se refiere el párrafo anterior, se contará a partir de la fecha en que se hubiese dado aviso de la substitución al sindicato o a los trabajadores (artículo 41 LFT).

responsabilidad patronal; sin embargo, si tal aviso no se genera, ello no puede tener repercusión en los derechos de los trabajadores, como ejemplo el de huelga[16].

> Aviso de sustitución patronal. El artículo 41 de la ley federal del trabajo, al no prever los requisitos para darlo, no viola la garantía de seguridad jurídica.
> "*El citado precepto, al no exigir formalidad alguna para dar el aviso señalado a fin de que inicie el plazo de 6 meses para que el patrón sustituido quede liberado de la responsabilidad solidaria con el sustituto por las obligaciones derivadas de las relaciones de trabajo y de la ley, no viola la garantía de seguridad jurídica contenida en el artículo 16 de la Constitución Política de los Estados Unidos Mexicanos, porque no impide al patrón cumplir con esa obligación, ya que ante la falta de requisitos podrá optar por la forma que estime más adecuada para dejar constancia fehaciente de la fecha en que dio a conocer a los trabajadores el cambio de patrón, entre otras, a través de la Junta competente en el procedimiento paraprocesal establecido en los numerales 982 y 983 del citado ordenamiento legal*."[17]

10. ¿Existe una regulación especial en caso de que la sucesión de empresa se lleve a cabo en un procedimiento concursal?

La legislación laboral establece (artículo 114) que los trabajadores no necesitan entrar a concurso, quiebra, suspensión de pagos o sucesión. Siendo la Junta de Conciliación y Arbitraje la que procederá al embargo y remate de los bienes necesarios para el pago de los salarios e indemnizaciones.

El Convenio Internacional del Trabajo No. 95[18] relativo a la protección del salario en su artículo 11 establece que en caso de quiebra o de liquidación judicial de una empresa, los trabajadores empleados en la misma deberán ser considerados como acreedores

[16] Época: Novena Época. Registro: 180444. Instancia: Tribunales Colegiados de Circuito. Tipo de Tesis: Aislada. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo XX, Septiembre de 2004. Materia(s): Laboral. Tesis: I.3o.T.80 L. Página: 1881. Sustitución patronal. En términos de lo dispuesto por el artículo 41 de la Ley Federal del Trabajo la omisión de dar aviso a los trabajadores o al sindicato correspondiente, no afecta el derecho de huelga de aquéllos.

[17] Época: Novena Época. Registro: 16974. Instancia: Segunda Sala. Tipo de Tesis: Aislada. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo XXVII, Mayo de 2008. Materia(s): Constitucional, Laboral. Tesis: 2a. LXII/2008. Página: 224. Amparo en revisión 148/2008. Industrias Ocotlán, S.A. de C.V. 30 de abril de 2008. Cinco votos. Ponente: José Fernando Franco González Salas. Secretaria: Martha Elba Hurtado Ferrer.

[18] Tratado internacional adoptado el 1º de julio de 1949 entrado en vigor internacional: 24 de septiembre de 1952. Ratificado por México el 27 de septiembre de 1955. En vigor para México: 27 de septiembre de 1956. Consultado el 09 de Marzo 2015 en:
https://www.scjn.gob.mx/libro/InstrumentosConvenio/PAG0279.pdf

preferentes en lo que respecta a los salarios que se les deban por los servicios prestados durante un período anterior a la quiebra o a la liquidación judicial, que será determinado por la legislación nacional, o en lo que concierne a los salarios que no excedan de una suma fijada por la legislación nacional.

En caso de concurso o quiebra legalmente declarada se dan por terminadas las relaciones de trabajo, si la autoridad competente o los acreedores resuelven el cierre definitivo de la empresa o la reducción definitiva de sus trabajos (artículo 434 Fracc. V).

En caso de reanudación de actividades de la empresa declarada en estado de concurso o quiebra, el patrón tendrá las obligaciones señaladas en el artículo 154 LFT que se refiere a preferir, en igualdad de circunstancias, a los trabajadores mexicanos respecto de quienes no lo sean, a quienes les hayan servido satisfactoriamente por mayor tiempo, a quienes no teniendo ninguna otra fuente de ingreso económico tengan a su cargo una familia, a los que hayan terminado su educación básica obligatoria, a los capacitados respecto de los que no lo sean, a los que tengan mayor aptitud y conocimientos para realizar un trabajo y a los sindicalizados respecto de quienes no lo estén.

11. Otras cuestiones relevantes en materia de sucesión de empresas

Relación de tesis jurisprudenciales relativas a la sustitución patronal (Suprema Corte de Justicia de la Nación):

- Número de Registro: 170002. Sustitución patronal. Si la demandada sustituta niega tener tal carácter, a ella le corresponde la carga de la prueba. Localización: [J]; 9a. Época; 2a. Sala; S.J.F. y su Gaceta; Tomo XXVII, Marzo de 2008; Pág. 261. 2a./J. 28/2008.

- Número de Registro: 170431. Sustitución patronal. Cuando de las actuaciones del juicio se advierta la posibilidad de que la demandada sea sustituida por otra, por existir indicios de que ésta tiene el mismo domicilio que aquélla, la junta puede prevenir al trabajador para que manifieste si desea entablar el incidente relativo con el objeto de que la empresa sustituta sea emplazada en el domicilio de la sustituida, a efecto de determinar su posible responsabilidad en el conflicto laboral. Localización: [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXVII, Enero de 2008; Pág. 2829. IV.3o.T.255 L.

- Número de Registro: 171183. Estados de cuenta individuales de los trabajadores. Su certificación por parte del instituto mexicano del Seguro Social tiene valor probatorio pleno, por lo que es apta para acreditar la relación laboral entre

aquéllos y el patrón. Localización: [J]; 9a. Época; 2a. Sala; S.J.F. y su Gaceta; Tomo XXVI, Octubre de 2007; Pág. 242. 2a./J. 202/2007.

- Número de Registro: 173904. Patrón sustituto. Es incorrecto considerar como tal a los socios de una sociedad anónima bajo el argumento de que deben responder solidariamente de las obligaciones a cargo de la persona moral. Localización: [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXIV, Noviembre de 2006; Pág. 1053. I.3o.T.147 L.

- Número de Registro: 180625. Huelga. No existe obligación de la autoridad laboral de ordenar su emplazamiento respecto del patrón sustituto si ya lo hizo al patrón sustituido. Localización: [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XX, Septiembre de 2004; Pág. 1778. I.3o.T.76 L .

- Número de Registro: 180544. Persona extraña al juicio. No tiene tal carácter el patrón sustituto, aun cuando sólo fue emplazado al procedimiento de huelga el sustituido. Localización: [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XX, Septiembre de 2004; Pág. 1833. I.3o.T.78 L.

- Número de Registro: 185481. Sustitución patronal. La junta puede resolver sobre la responsabilidad derivada de aquélla, cuando del expediente se desprendan los hechos que la generan y hayan sido llamados a juicio tanto el patrón sustituido como el sustituto. Localización: [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XVI, Noviembre de 2002; Pág. 1195. I.6o.T.138 L.

- Número de Registro: 196828. Patrón sustituto y sustituido. Ineficacia del pacto de que sólo uno de ellos responderá de las obligaciones nacidas antes de la fecha de la sustitución. Localización: [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo VII, Febrero de 1998; Pág. 523. I.9o.T.79 L.

SUCESIÓN Y TRANSMISIÓN DE EMPRESAS EN URUGUAY

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Introducción

En Uruguay no existe una normativa específica que tenga por objeto regular las situaciones de *sucesión empresarial.* En los hechos esta noción puede abarcar situaciones de muy diversa índole. Todas aquellas situaciones en las que se producen cambios o sustituciones de la figura del empleador, ponen en juego una serie de aspectos laborales de gran sensibilidad. En particular, se vinculan con el problema de la continuidad de las relaciones individuales de trabajo y, muy especialmente, con la detección de una figura que responda frente a las deudas de naturaleza laboral.

Las soluciones deben contemplar los particularismos del Derecho Laboral y esto seguramente conduce a concluir que el tratamiento que en estas hipótesis corresponde dar al crédito que el trabajador ha generado con su trabajo, no necesariamente será idéntico al que se dará a los créditos que poseen otra naturaleza.

A este respecto, parece imprescindible que cualquier solución tenga presente la especial protección que constitucionalmente se prevé para el trabajo, la especial protección que el ordenamiento prevé para el salario (factor del que depende la subsistencia del trabajador), la primacía de la realidad, que revela que, en la mayor parte de los casos el trabajador común no conoce ni le interesa conocer los cambios que se operan en la titularidad de la empresa en que se desempeña.

1.a. ¿Existe en el ordenamiento jurídico de Uruguay una regulación específica sobre los derechos de los trabajadores afectados por un fenómeno de sucesión de empresa? En caso afirmativo, ¿esta norma es el resultado de algún convenio o pacto supranacional?

No existe en el ordenamiento jurídico uruguayo una regulación específica, de alcance general, que contemple en forma sistematizada los derechos de los trabajadores afectados por un fenómeno de sucesión de empresa. Las escasas disposiciones que hacen referencia al tema, carecen de unidad, se encuentran dispersas y, además,

solamente regulan determinados aspectos, muy parciales y –podría decirse– accesorios de este tipo de situaciones. Esa ausencia de regulación positiva determina que muchas de las consecuencias que en la práctica se proyectan en los casos de *sucesión* de *empresa o de empleadores*, sean el resultado de elaboraciones originadas en la producción doctrinaria.

2. ¿Cuáles son los supuestos de hecho que configuran la situación de «sucesión de empresa»? ¿De qué manera se trata el fenómeno de la sucesión de empresa por previsión expresa en convenio colectivo? ¿Y la situación de sucesión de empresa por sucesión de plantilla?

En ausencia de una normativa precisa, sistematizada y general en la materia, en Uruguay la noción de *sucesión, transmisión* o *sustitución* de la figura del sujeto empleador puede considerarse comprensiva de una muy variada gama de situaciones. En tal sentido, se toma como punto de partida al principio de *primacía de la realidad*, y, con base en el mismo, es posible calificar como *sucesión de empleadores* a una serie de hipótesis que desde la perspectiva de otras disciplinas jurídicas no necesariamente se consideran *cambios de titularidad empresarial*. Así por ejemplo, la venta del paquete accionario de una sociedad anónima, que formalmente no supone un cambio de la persona jurídica (que continúa siendo la misma), podría en ciertos casos llegar a ser presentada por el Derecho del Trabajo como una hipótesis de sustitución del empleador, provocando una serie de consecuencias en las relaciones laborales.

Las diversas modalidades que suelen identificarse como *sucesión del empleador*, son abordadas, entonces, a partir de los principios y criterios hermenéuticos propios de la disciplina Laboral. En particular, corresponde destacar: el principio de *continuidad* y el principio de *primacía de la realidad*.

El principio de continuidad incide al considerar el problema de la extinción o mantenimiento de las relaciones individuales de trabajo. Por su parte, el principio de primacía de la realidad adquiere relevancia a la hora de detectar los posibles responsables frente a los diferentes créditos laborales.

3. ¿Es nulo (readmisión como único efecto) el despido que tiene su causa en la sucesión de empresa?

No. En el ordenamiento jurídico uruguayo no existe ninguna norma que establezca la nulidad del despido causado en la sucesión de empresas, ni tampoco se determinan consecuencias jurídicas de ningún tipo para el despido motivado en dicho fenómeno. Es más: en rigor hay que decir que tampoco existe una regulación que defina cuáles son las

consecuencias que el fenómeno de la sucesión empresarial provoca sobre la vigencia o continuidad del vínculo laboral y de hecho en la doctrina se han planteado opiniones diversas a este respecto.

La jurisprudencia se ha adherido sin fisuras a la posición de PLÁ RODRÍGUEZ, que defendía la supervivencia de las relaciones individuales de trabajo a partir del carácter no personalísimo de las obligaciones asumidas por el empleador y la vigencia del principio de continuidad (*Los principios del Derecho del Trabajo*, 3ª ed. actualizada, Depalma, Bs. As., 1998, p. 274). Sin embargo, otro destacado exponente de la doctrina uruguaya, Francisco DE FERRARI, había sostenido lo contrario, usando como fundamento las disposiciones contenidas en la Ley N° 10.570, del 15 de diciembre de 1944. Dicha ley (todavía vigente) extendió a los trabajadores remunerados a destajo o a salario por día o por hora, el beneficio de la indemnización por despido que había sido consagrado antes por la Ley N° 10.489 para los empleados y obreros del comercio. La posición de DE FERRARI se fundaba en los artículos 2 y 3 de La ley N° 10.570.

El artículo 2 dice lo siguiente: "[l]*os beneficios de la indemnización por despido se aplicarán con retroactividad al 1° de julio de 1944 en los casos de enajenación, fusión, transferencia de establecimientos, sus secciones o dependencias, así como cuando la clausura de los mismos no resulte de quiebra o concurso, y serán atendidos por el establecimiento que contrató los servicios ya prestados por el personal cesante*". Por su parte, el artículo 3, dispuso: "[d]*esde la sanción de la presente ley y en los casos referidos en el artículo anterior, los sucesores, si los hubiere, responderán subsidiariamente de las indemnizaciones impagas*".

A partir de estas normas, DE FERRARI concluía que el legislador había plasmado la extinción *ipso jure* de los contratos de trabajo como consecuencia de la enajenación del establecimiento comercial y en las otras hipótesis que maneja el artículo 2 de la Ley N° 10.570. En otros términos, el destacado profesor uruguayo consideraba que uno de los efectos provocados por la enajenación del establecimiento comercial consistía en provocar la extinción automática de todos los vínculos individuales de trabajo. Para DE FERRARI esta era, además, la solución correcta, porque entendía que ningún precepto legal podía obligar a una persona a prestar servicios para otra sin su consentimiento.

Confrontando con la posición de DE FERRARI, PLÁ RODRÍGUEZ centró su atención en la parte final del artículo 2 de la Ley 10.570, donde se alude al "personal cesante" y de dicha expresión infiere que la indemnización por despido sólo debe pagarse a aquellos trabajadores que hubieren sido despedidos en el marco del proceso de transferencia del establecimiento. Además, agregaba PLÁ, la indemnización por despido tiene por

finalidad reparar el daño que provoca al trabajador la pérdida del empleo, daño que no se presenta cuando la relación de trabajo continúa en igualdad de condiciones.

Como fuera dicho, la posición que sostiene la continuidad de los vínculos laborales en caso de cambio en la figura del empleador resultó prevaleciente tanto en doctrina como en la jurisprudencia y hoy puede considerarse como unánime. La *sucesión empresarial* no necesariamente provoca la extinción de las relaciones individuales de trabajo, sino que éstas habrán de continuar con el adquirente o sucesor.

Sin embargo, es requisito necesario para que esto acontezca así, que el adquirente respete las condiciones de trabajo preexistentes, evitando disminuirlas o alterarlas en un sentido menos beneficioso para el trabajador, cuestión a la que se hará referencia en el siguiente numeral.

4. ¿Se permite que la empresa cesionaria modifique las condiciones de trabajo de los trabajadores afectos a la sucesión cuando están reguladas en convenio colectivo?

El adquirente de la empresa deberá respetar las condiciones de trabajo preexistentes (cualquiera sea la fuente de las mismas, incluidas, por lo tanto, aquellas que se encuentren plasmadas en un convenio colectivo), evitando disminuirlas o alterarlas en un sentido menos beneficioso para el trabajador. De lo contrario se podría configurar una hipótesis de *despido indirecto.*

En puridad, dicha exigencia se abstrae de la propia circunstancia del cambio de titularidad empresarial, puesto que las alteraciones *in pejus* de las condiciones laborales poseen la aptitud de provocar el despido indirecto aun cuando no se esté frente a situaciones de cambio en la figura del empleador. En otros términos: en tales hipótesis, lo que provoca la crisis del vínculo laboral no es el cambio del sujeto empleador, sino la improcedente alteración de las condiciones de trabajo preexistentes.

Es natural y frecuente que el nuevo empleador pretenda introducir cambios en la organización del trabajo, adaptando la empresa a su propia modalidad o estilo. En este proceso, sus posibilidades de variación quedarán delimitadas por los parámetros del ejercicio lícito y no abusivo del *jus variandi*, potestad excepcional que se reconoce al empleador de introducir cambios unilateralmente en determinados aspectos no esenciales de la prestación de las tareas (ver IUSLabor 3/2014). La introducción de alteraciones que excedan los límites legítimos del *jus variandi* puede provocar la ruptura del vínculo laboral, efecto que también se provocaría en hipótesis en que no ha cambiado la figura del empleador.

Dentro de las condiciones laborales a considerar se encuentra, naturalmente, el mantenimiento o respeto de la antigüedad del trabajador. Al respecto en doctrina y jurisprudencia prevalece la opinión de que el reconocimiento de la antigüedad no requiere un pronunciamiento expreso del adquirente, sino que opera como hecho (*Los principios...*, nota 478, p. 283).

De todo cuanto se viene señalando se desprende que si las nuevas condiciones de trabajo que pretende imponer el adquirente implicaran un perjuicio para el trabajador (en cuanto a salarios, categorías, regímenes horarios, desconocimiento de la antigüedad, etc.) éste quedará facultado para considerarse indirectamente despedido, del mismo modo que lo estaría sin que hubiera operado el cambio de la figura del empleador.

Pero corresponde insistir: lo que en realidad posee la virtualidad de provocar la extinción del vínculo laboral no es la sustitución subjetiva del empleador, sino los cambios objetivos que el adquirente pretenda introducir en la relación.

Es necesario puntualizar que en determinadas hipótesis excepcionales, el mero cambio subjetivo del empleador sí puede habilitar al trabajador a considerarse despedido. Se trata de aquellas situaciones de excepción en que la figura del empleador posee carácter *intuitu personae*, por haber sido determinante para el trabajador al contratar con él. Por último, pueden existir algunas otras situaciones excepcionales en que el mero cambio de la figura del empleador habilita al trabajador a considerar extinguido el vínculo. Tal podría ser el caso de un adquirente que posee notorios antecedentes de incumplimientos laborales o de prácticas contrarias a la libertad sindical u otros derechos colectivos. En estas dos últimas hipótesis, la carga de la prueba de las circunstancias invocadas recae sobre el trabajador.

5. ¿Se permite que se modifiquen las condiciones de trabajo de los trabajadores afectos a la sucesión cuando no están reguladas en convenio colectivo?

Las limitaciones que a este respecto pesan sobre el adquirente no varían en función de cuál sea la fuente en que tienen su origen. Por lo tanto, es indiferente que las condiciones de trabajo tengan su fundamento en una norma legal, convencional colectiva, acuerdo individual o, incluso, costumbre o uso empresarial. En cualquier caso su modificación puede provocar el efecto que fue descripto anteriormente.

6. ¿Qué sucede con los compromisos por pensiones que los trabajadores transmitidos tuviesen con la empresa cedente?

El tipo de prestaciones que se describen en la pregunta no son habituales en la realidad uruguaya. Sin perjuicio de ello, si las mismas existiesen, deberían ser respetadas por la empresa cesionaria o adquirente, pues se les aplicarían los mismos criterios que han sido descriptos más arriba al hacer referencia a las limitantes que en tal sentido pesan sobre aquélla.

7. ¿El empresario cesionario es responsable de las deudas laborales (salario, Seguridad Social…) que tuvieran los trabajadores afectados por la sucesión con el empresario cedente?

Para responder a esta pregunta es necesario distinguir tres tipos de créditos –o deudas– laborales, a saber:

a) Los créditos que poseen naturaleza salarial (con excepción de la licencia).
b) El crédito por concepto de licencia (vacaciones).
c) La indemnización por despido.

a) Créditos salariales (excepto la licencia):

En general, la pregunta sobre quién es el responsable frente a los créditos salariales en casos de enajenación del establecimiento comercial ha sido respondida por la doctrina y la jurisprudencia, ubicando como centro de la cuestión a las disposiciones de la Ley N° 2.904, del 20 de abril de 1904 (sobre enajenación de establecimientos comerciales). Con base en dicha antigua norma se distinguen aquellas situaciones en que se ha cumplido el requisito de las publicaciones (que se prevé en aquélla), de las situaciones en las que no se ha dado cumplimiento a tal requisito. La segunda de las hipótesis no presenta inconvenientes ya que por imperio de la norma contenida en el artículo 3 de la Ley N° 2.904, la omisión provoca la *solidaridad pasiva* entre enajenante y adquirente por todas las deudas preexistentes y, además, por todas las que se contraigan mientras no se efectúen dichas publicaciones.

En cambio, se plantean algunas dudas cuando sí se da cumplimiento al requisito de las publicaciones (circunstancia bastante infrecuente en la práctica). En este caso, pueden plantearse diferentes respuestas. La primera respuesta puede inferirse *a contrario sensu* de los criterios manejados a nivel jurisprudencial: si los fallos mencionan recurrentemente la ausencia de las publicaciones para concluir en la responsabilidad solidaria de enajenante y adquirente, debe suponerse que si en alguna hipótesis se diera cumplimiento a dichas publicaciones la conclusión sería que el adquirente sólo será

solidariamente responsable con el enajenante por aquellas deudas preexistentes que consten "*en los libros de la casa*" o que se hayan presentado durante el término del emplazamiento. Si la deuda laboral no consta "*en los libros de la casa*" y el titular del crédito salarial no se presentó durante el término del emplazamiento, el adquirente no será responsable. En este caso –y según esta primera respuesta posible– el trabajador sólo podría exigir el pago al enajenante. Aquí cabría interrogarse acerca del alcance que corresponde otorgarle a la expresión "*libros de la casa*". Elementales razones de protección de los créditos laborales permiten sostener que la expresión debería ser tomada en un sentido amplio, abarcando todos los documentos a los que razonablemente accede –o puede acceder– quien aspira a adquirir una empresa. A tales efectos adquiere relevancia el estándar jurídico que comúnmente es enunciado bajo la idea del "*buen hombre de negocios*".

Pero la doctrina también ha planteado otras respuestas. SARTHOU ha sostenido que el adquirente también es responsable solidariamente aun cuando se hubieren hecho las publicaciones, el crédito laboral no conste en los libros de la casa y el mismo no se hubiera presentado dentro del período del emplazamiento. Fundamenta su posición en la idea de la irrenunciabilidad de los derechos y beneficios otorgados por las normas laborales y el interés fundamental de la colectividad en el cumplimiento del salario mínimo. Agrega este autor que si el trabajador ya estaba desvinculado de la empresa cuando se efectúan las publicaciones, difícilmente tome conocimiento de las mismas y si aún estaba vinculado a la empresa en dicho momento, se suma un argumento adicional: la falta de libertad para reclamar, máxime cuando esa presentación implica cierto grado de desconfianza del cumplimiento de sus obligaciones hacia el adquirente y actual empleador ("Las deudas del contrato de trabajo y la enajenación de empresas en el derecho uruguayo", *Revista de Derecho, Jurisprudencia y Administración*, T. 65, p. 179). Por su parte, PLÁ RODRÍGUEZ sostiene que la respuesta depende de la posición que se adopte con referencia a la continuidad o no de los vínculos laborales: si se admite que continúan los mismos contratos de trabajo con un simple cambio de empleador, la misma empresa –aun cuando esté total o parcialmente a cargo de otro titular– sigue como deudora de todas las obligaciones laborales pendientes, aunque se hayan originado con anterioridad. Solamente si se parte del supuesto –dice PLÁ– de que no continúan los mismos contratos de trabajo, debe buscarse la solución con respecto a cada uno de los distintos beneficios, analizándolos a la luz de las disposiciones vigentes (*Los principios...*, cit., p. 303 y 304).

No resulta sencillo optar por una u otra de las soluciones que vienen de exponerse. La que aplica estrictamente la solución consagrada en la Ley N° 2.904, protege la certeza del adquirente, evitándole la desagradable sorpresa que implica asumir la responsabilidad por un pasivo laboral desconocido. En cambio, las soluciones que

propugnan la responsabilidad solidaria de enajenante y adquirente en cualquier hipótesis, parecen contemplar mejor la especial protección jurídica que la Constitución uruguaya (artículo 53) destina al trabajo humano y que asume rasgos muy intensos cuando se proyecta sobre la materia salarial. También estas últimas soluciones parecen resultar más acordes al principio de primacía de la realidad, en la medida que es perfectamente posible y habitual que la transferencia de la titularidad de la empresa pase completamente desapercibida para el común de los trabajadores, quienes –obviamente– también son titulares del bien jurídico "certeza jurídica" (en este caso, se trata de la certeza en la percepción del salario por el trabajo ya brindado).

Pero, como se ha señalado, en la práctica estas cuestiones no suelen quedar sometidas a la decisión judicial, dado que es muy poco habitual que se cumplan las publicaciones que establece la Ley N° 2.904.

b) El crédito por concepto de licencia

En el caso de la licencia existen disposiciones legales específicas. Se trata del artículo 13 de la Ley N° 12.590, del 23 de diciembre de 1958, que consagra la *responsabilidad solidaria* del enajenante y del adquirente por los jornales de licencia adeudados, sin condición alguna de publicidad o presentación de los créditos. El Decreto Reglamentario, de fecha 26 de abril de 1962, en su artículo 27 reitera lo dispuesto por la mencionada norma legal y agrega, en su segundo inciso que "[a] *los trabajadores que continúen en el establecimiento con la nueva firma, se les reconocerá automáticamente su antigüedad total en el mismo, con prescindencia de la enajenación operada*", introduciendo así un concepto de antigüedad personal y objetiva, ligada a la empresa y no a la persona de sus titulares.

c) La indemnización por despido

En este caso también existen disposiciones legales especiales. Se trata del artículo 3 de la Ley N° 10.570, del 15 de diciembre de 1944, que establece la responsabilidad subsidiaria de los sucesores por las indemnizaciones por despido impagas. De este modo, el adquirente responde subsidiariamente por las indemnizaciones resultantes de los despidos dispuestos por el enajenante.

Cabe señalar que esta disposición debe coordinarse con lo dispuesto en la Ley N° 2.904, de tal forma que el adquirente también puede responder en forma solidaria por las indemnizaciones por despidos impagas, si no se han cumplido las publicaciones o si las deudas por este concepto surgen de los "libros de la casa" o fueron presentadas en el término del emplazamiento.

8. Si entre los trabajadores afectados por la sucesión hay representantes de los trabajadores, ¿mantienen éstos su condición de representantes en la empresa cesionaria?

La sucesión no tiene ninguna incidencia a dicho respecto. El hecho de que los representantes de los trabajadores mantengan o no tal condición luego de producida la sucesión, depende exclusivamente de lo que al respecto decidan los propios trabajadores.

9. ¿Se prevén derechos de información y consulta para los trabajadores afectos a la sucesión y/o sus representantes legales en la empresa cedente y/o cesionaria? ¿Qué consecuencias se derivan del incumplimiento de dichos deberes de información y consulta?

No existe ninguna previsión normativa con alcances generales a este respecto. La cuestión suele plantearse en el plano de la reivindicación sindical, pero no existe ninguna disposición de origen legal sobre el punto.

10. ¿Existe una regulación especial en caso de que la sucesión de empresa se lleve a cabo en un procedimiento concursal?

La Ley Nº 18.387 (Ley de Concursos y Reorganización Empresarial) del 23 de octubre de 2008 prevé la denominada *venta en bloque* de la empresa que se encuentra en situación de concurso, cuando el propio concursado fracasa en la alternativa de darle continuidad al emprendimiento y ello determina la apertura de la etapa de liquidación (artículo 168). La *venta en bloque* es un mecanismo de carácter prioritario por expresa disposición legal (artículo 171: "[e]*n todos los casos se procurará en primer lugar*"). La misma ley establece el procedimiento a seguir en estos casos, previendo incluso que sean los propios trabajadores de la empresa concursada quienes, previa constitución de una cooperativa o sociedad comercial y cumpliendo con determinadas exigencias, puedan realizar una oferta en condiciones de preferencia respecto de otros interesados (artículo 172). A su vez, otra Ley (Nº 18.407) establece que en los procesos liquidatorios concursales tendrán prioridad a los efectos de la adjudicación de la empresa como unidad, las cooperativas de trabajo que se constituyan con la totalidad o parte del personal de dicha empresa (artículo 104).

El artículo 177 de la Ley Nº 18.387 dispone que "[n]*o será de aplicación al adquirente de los activos del deudor, del establecimiento o de la explotación del deudor, enajenados en el proceso de liquidación de la masa activa, la responsabilidad que la*

ley pone a cargo de los sucesores o adquirentes por obligaciones comerciales, laborales, municipales, tributarias o de cualquier otra naturaleza".

SUCESIÓN Y TRANSMISIÓN DE EMPRESAS EN VENEZUELA

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Introducción

Desde la misma denominación que se le otorga en nuestro país al fenómeno de la transmisión de empresa, "Sustitución de Patrono" ya nos avisa que el énfasis en nuestro ordenamiento jurídico laboral no está en aquello que se trasmite, sino en regular/proteger las relaciones de trabajo en el que ha cambiado una de las personas: el empleador o patrono, independientemente del contenido o alcance de lo que se transmite.

En nuestro contexto, basta que se produzca este cambio de patrono para que se activen todos los mecanismos de protección para el trabajador (mantenimiento de las condiciones de trabajo, responsabilidad solidaria por cinco años entre patrono sustituto y sustituido, no despido por causa de la sustitución de patrono, posibilidad de retiro justificado del trabajador quien podrá optar por la renuncia que deberá ser indemnizada por el patrono) por lo que la discusión doctrinal o jurisprudencial sobre el tema es mucho más básica que las profundas dialécticas desarrolladas en el ámbito europeo sobre este tema en particular.

Un régimen de protección que, sin embargo, se repliega ante el Estado en aquellos casos en el que éste procede a la adquisición forzosa de una entidad de trabajo que ha sido cerrada en cuyo caso ya no hay responsabilidad solidaria sino que toda la responsabilidad recae en el patrono sustituido.

1.a. ¿Existe en el ordenamiento jurídico de Venezuela una regulación específica sobre los derechos de los trabajadores afectados por un fenómeno de sucesión de empresa? En caso afirmativo, ¿esta norma es el resultado de algún convenio o pacto supranacional?

En el ordenamiento jurídico venezolano, el fenómeno de la sucesión o transmisión de empresa y sus efectos jurídico-laborales, está regulado en la Ley Orgánica del Trabajo, los Trabajadores y las Trabajadoras (LOTTT), en su Título II, capítulo III, artículos 66 y siguientes, identificándose como "Sustitución de Patrono o Patrona" (SP). Con relación a los derechos de los trabajadores afectados por la SP, a tenor de lo previsto en el artículo 68 de la ley en mención, la SP no afectará las relaciones individuales y

colectivas de trabajo existentes, estableciéndose la responsabilidad solidaria entre el patrono sustituido y el nuevo patrono por las obligaciones derivadas de la LOTTT, de los contratos individuales, de las convenciones colectivas, los usos y costumbres, nacidos antes de la sustitución, hasta por el término de cinco (5) años. En el caso del ordenamiento jurídico venezolano el régimen normativo de la SP no es producto o resultado de algún convenio o pacto supranacional.

2. ¿Cuáles son los supuestos de hecho que configuran la situación de «sucesión de empresa»? ¿De qué manera se trata el fenómeno de la sucesión de empresa por previsión expresa en convenio colectivo? ¿Y la situación de sucesión de empresa por sucesión de plantilla?

De conformidad con lo previsto en el artículo 66 LOTTT, se considera que hay SP cuando por cualquier causa se transfiera la propiedad, la titularidad de una *entidad de trabajo* o parte de ella, a través de cualquier título, de una persona natural o jurídica a otra, por cualquier causa y continúen realizándose las labores de la entidad de trabajo aún cuando se produzcan modificaciones.

Ahora bien, en la misma Ley en comentario, se desarrolla el alcance de lo que debe entenderse por *entidad de trabajo*. En efecto, el artículo 45 *eiusdem*, dice que se entenderá por entidad de trabajo: a) la empresa o unidad de producción de bienes o servicios constituida para realizar una actividad económica de cualquier naturaleza o importancia; b) el establecimiento o la reunión de medios materiales y de trabajadores permanentes que laboran en un mismo lugar, en una misma tarea, de cualquier naturaleza o importancia, y que tienen una dirección técnica común; c) toda combinación de factores de la producción sin personalidad jurídica propia, ni organización permanente que busca satisfacer necesidades y cuyas operaciones se refieren a un mismo centro de actividad económica. d) toda actividad que envuelva la prestación del trabajo en cualquieras condiciones; e) los órganos y entes del Estado prestadores de servicio.

De la norma en comentario se desprende que el alcance de lo que debe entenderse como *entidad de trabajo* en el ordenamiento jurídico-laboral venezolano, es mucho más amplia que la noción de *entidad económica* al que se refiere el artículo 44.2 ET español, por lo que no se presentan en nuestro contexto las dudas interpretativas ni a nivel doctrinal ni jurisprudencial sobre el alcance de la SP. Si consideramos, por ejemplo, el artículo 45.d) que establece que se entiende como entidad de trabajo toda actividad que envuelva la prestación del trabajo en cualquier condición, no cabe duda que el régimen jurídico-laboral de la SP deberá aplicarse a *todos* los supuestos de "sucesión de plantilla" sin que se pueda plantearse un tratamiento o régimen diferenciado basado en

el contenido de lo transmitido al nuevo empleador visto, insistimos, el alcance tan amplio de lo que debe entenderse por *entidad de trabajo* en nuestro contexto. En realidad, en esta materia para la LOTTT lo relevante es que se constate que se ha producido un cambio de patrono o empleador independientemente de la entidad de trabajo que se trate.

Con relación a la posible aplicación diferenciada de una SP mediante la previsión de porcentajes de plantilla en una convención colectiva, creemos que en nuestro ordenamiento no es posible hacerlo. En efecto, a tenor de lo dispuesto en el artículo 434 LOTTT la convención colectiva de trabajo no podrá concertarse en condiciones menos favorables para los trabajadores y trabajadoras que las contenidas en los contratos de trabajo vigentes. No obstante, podrán modificarse las condiciones de trabajo vigentes si las partes convienen en cambiar o sustituir algunas de las cláusulas establecidas, por otras, aun de distinta naturaleza, que consagren beneficios que en su conjunto sean más favorables para los trabajadores. Es condición necesaria para la aplicación de este artículo indicar en el texto de la convención, con claridad, cuáles son los beneficios sustitutivos de los contenidos en las cláusulas modificadas. No se considerarán condiciones menos favorables el cambio de un beneficio por otro, aunque no sea de naturaleza similar, debiéndose dejar constancia de la razón del cambio o de la modificación.

3. ¿Es nulo (readmisión como único efecto) el despido que tiene su causa en la sucesión de empresa?

En términos generales, de acuerdo con lo previsto en el artículo 77 LOTTT los despidos contrarios a esta Ley son nulos y, de acuerdo con lo establecido en el artículo 68 *eiusdem*, la SP, no afectará las relaciones individuales y colectivas de trabajo existentes, por ende, debe considerarse nulo todo despido cuyo fundamento sea la SP. Ahora bien, de acuerdo con lo dispuesto en el artículo 92 LOTTT, en caso de terminación de la relación de trabajo por causas ajenas a la voluntad del trabajador o en los casos de despido sin razones que lo justifiquen cuando el trabajador manifestara su voluntad de no interponer el procedimiento para solicitar el reenganche (readmisión), el patrono deberá pagar una indemnización equivalente al monto que le corresponde por las prestaciones sociales. Y, de acuerdo con lo previsto en el artículo 142.C, cuando la relación de trabajo termine por cualquier causa, se calcularán las prestaciones sociales con base a treinta días por cada año de servicio o fracción superior a los seis meses calculada al último salario.

4. ¿Se permite que la empresa cesionaria modifique las condiciones de trabajo de los trabajadores afectos a la sucesión cuando están reguladas en convenio colectivo?

De la lectura de los artículos 66 y 68 LOTTT pudiese traer alguna confusión en su aplicación sobre las condiciones de trabajo reguladas en convenio colectivo y su posible modificación como consecuencia de una SP. En efecto, el artículo 66 de la normativa en comentario prevé que existirá SP, cuando por cualquier causa se transfiera la propiedad, la titularidad de una entidad de trabajo o parte de ella, a través de cualquier título, de una persona natural o jurídica a otra, por cualquier causa y continúen realizándose las labores de la entidad de trabajo aún cuando se produzcan modificaciones, lo que pareciera dejar la puerta abierta para que tales modificaciones en las condiciones de trabajo se produzcan como consecuencia de la SP. Pero luego el artículo 68 *eiusdem* consagra que la SP, no afectará las relaciones individuales y colectivas de trabajo existentes.

El patrono sustituido, será solidariamente responsable con el nuevo patrono, por las obligaciones derivadas de esta Ley, de los contratos individuales, de las convenciones colectivas, los usos y costumbres, nacidos antes de la sustitución, hasta por el término de cinco años, lo que pareciera cerrar la puerta que abría el artículo antes citado a las modificaciones en las condiciones de trabajo. En nuestro criterio, lo que ha querido el artículo 66 LOTTT es asegurar o garantizar los derechos de los trabajadores en caso de SP aunque en el supuesto concreto se hubiese producido alguna modificación como consecuencia del cambio de empleador, pero salvo que se negocie una nueva convención colectiva con el nuevo empleador, no será posible para éste ni individual ni colectivamente modificar, *in peius*, las condiciones de trabajo pactadas con el antiguo empleador.

5. ¿Se permite que se modifiquen las condiciones de trabajo de los trabajadores afectos a la sucesión cuando no están reguladas en convenio colectivo?

Por lo explicado en la anterior respuesta, no es posible modificar las condiciones de trabajo como consecuencia de una SP, ni individual, ni colectivamente. Ha querido el legislador que el contrato de trabajo permanezca inmune a cualquier efecto pernicioso derivado de la SP.

6. ¿Qué sucede con los compromisos por pensiones que los trabajadores transmitidos tuviesen con la empresa cedente?

Si en la contratación individual o colectiva estuviese previsto un régimen de pensiones con mayores beneficios que las prestaciones públicas permanentes de Seguridad Social, deberá ser asumido por el nuevo empleador. En efecto, el artículo 68 de la LOTTT no deja lugar a dudas en cuanto a que la SP, no afectará las relaciones individuales y colectivas de trabajo existentes, por lo que el patrono sustituido, será solidariamente responsable con el nuevo patrono por las obligaciones derivadas de la LOTTT, de los contratos individuales, de las convenciones colectivas, los usos y costumbres, nacidos antes de la sustitución, hasta por el término de cinco años.

7. ¿El empresario cesionario es responsable de las deudas laborales (salario, Seguridad Social…) que tuvieran los trabajadores afectados por la sucesión con el empresario cedente?

Si. Con base a la norma citada en la respuesta anterior, y reiteramos, el artículo 68 de la LOTTT no deja lugar a dudas en cuanto a que el patrono sustituido y el nuevo patrono, serán solidariamente responsable con el nuevo patrono por las obligaciones derivadas de la LOTTT, de los contratos individuales, de las convenciones colectivas, los usos y costumbres, nacidos antes de la sustitución, hasta por el término de cinco años.

Concluido este plazo, subsistirá únicamente la responsabilidad del nuevo patrono, salvo que existan juicios laborales anteriores, caso en el cual las sentencias definitivas podrán ejecutarse indistintamente contra el patrono sustituido o contra el sustituto. La responsabilidad del patrono sustituido o patrona sustituida sólo subsistirá, en este caso, por el término de cinco años contados a partir de la fecha en que la sentencia quede definitivamente firme.

8. Si entre los trabajadores afectados por la sucesión hay representantes de los trabajadores, ¿mantienen éstos su condición de representantes en la empresa cesionaria?

Nada prevé la LOTTT específicamente sobre el tema. Pero siguiendo la intención del legislador en cuanto a que la SP deje indemne las relaciones de trabajo preexistentes, habría que concluir que, efectivamente mantienen su condición de representantes en la empresa cesionaria. En todo caso, habría que armonizar determinados supuestos de SP en la que la entidad de trabajo se fusiona con otras entidades del nuevo empleador en los que ya existen representantes. Pero, en principio, la SP no es motivo para que los

representantes de la empresa cesionaria dejen de serlo por tal motivo, al menos, así no lo prevé la LOTTT.

9. ¿Se prevén derechos de información y consulta para los trabajadores afectos a la sucesión y/o sus representantes legales en la empresa cedente y/o cesionaria? ¿Qué consecuencias se derivan del incumplimiento de dichos deberes de información y consulta?

De conformidad con lo previsto en el artículo 69 LOTTT, la SP deberá ser previamente notificada a (i) los trabajadores, (ii) su organización sindical si la hubiere y (iii) al inspector o inspectora del trabajo (autoridad administrativa de primer grado). Hecha la notificación, si el trabajador considerase inconveniente la sustitución para sus intereses, dentro de los tres meses siguientes, podrá exigir la terminación de la relación de trabajo y el pago de las prestaciones e indemnizaciones conforme a lo establecido en la normativa en comentario. No prevé la LOTTT régimen de sanción alguno de no cumplirse con tal notificación previa de la SP.

10. ¿Existe una regulación especial en caso de que la sucesión de empresa se lleve a cabo en un procedimiento concursal?

No existe una regulación especial al respecto. En nuestro país todavía no existe un procedimiento concursal unificador sino que siguen vigentes los obsoletos procedimientos de atraso y quiebra que datan de principios del siglo 20. Y por su lado, la LOTTT ha "blindado" los créditos laborales al establecer un privilegio y preferencia "absoluta" por encima de cualquier otro tipo de crédito, otorgando de forma exclusiva y excluyente el conocimiento de estos asuntos a la jurisdicción laboral (artículos 150 y 151 LOTTT).

11. Otras cuestiones relevantes en materia de sucesión de empresas

Cabe destacar una importante excepción al régimen general aplicable a la sustitución de patrono que prevé la LOTTT. En efecto, dispone su artículo 67 que no se considerará sustitución de patrono, cuando después del cierre de una entidad de trabajo, el Estado realice la adquisición forzosa de los bienes para reactivar la actividad económica y productiva, como medida de protección al trabajo y al proceso social de trabajo, independientemente que sean los mismos trabajadores y trabajadoras y sean las mismas instalaciones. Las deudas del patrono con los trabajadores, serán canceladas por dicho patrono, o descontadas del precio convenido a pagar por el Estado, o garantizando su pago por éste en acuerdo con los trabajadores.

SUCCESSION AND TRANSFER OF BUSINESSES IN CANADA

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Introduction

Canada is a liberal market economy and as such the freedom of owners of capital to transfer businesses is not heavily regulated and the rights of workers affected by those transfers are limited. Before discussing those rights some preliminary matters need to be addressed.

First, labour and employment law is regulated at the level of the provinces and territories. As a result, there is no nationally applicable statutory labour or employment law. However, the laws of most provinces and territories are roughly similar. Because we cannot possibly canvas the laws of each Canadian jurisdiction, we have used the laws of Ontario, Canada's most populous province, as the basis of our answer. The one exception is in the area of bankruptcy and insolvency, which is under federal jurisdiction. As a result, in that area, provincial labour and employment laws have to be coordinated with federal bankruptcy law.

Second, labour and employment rights are layered. Employment standards statutes establish rights for all workers, whether they are unionized or not. The common law, which is judicially made, only applies to non-unionized workers. Collective bargaining statutes only apply to unionized workers and only address the question of the continuity of collective bargaining rights as the result of a transfer. Currently, about 30% of the Canadian labour force is unionized, but unionization in the private sector, where the issue of transfer of a business is most likely to arise, is about 17%.

Generally speaking, employees may be terminated as the result of the transfer of a business and their principle protection is that they become entitled to notice, or termination pay if notice is not given, and severance pay. Employment standards laws establish minimum entitlements to notice/notice pay and severance pay based on years of employment with the terminating employer. Non-unionized employees may seek greater entitlements to notice/notice pay under the common law and unionized employees may have greater rights under the collective agreement. Where employees of the transferor are hired by the transferee then the law may also provide there is continuity in employment and that seniority for the purposes of calculating various entitlement is unaffected by the transfer.

1.a. Does the legal system of Canada establish a specific regulation regarding the rights of workers affected by a transfer of businesses? If so, is this rule the result of a supranational agreement?

Yes. The individual rights of workers in the context of a transfer are regulated through the *Employment Standards Act* (ESA) (S.O. 2000, c. 41). Collective bargaining rights in the event of a transfer are regulated by the *Labour Relations Act* (LRA) (S.O. 1995, c. 1, Sched. A). As well, non-unionized employees may claim certain rights in the event of a transfer based on the common law, which is judge-made law. None of these rules were created as the result of a supranational agreement.

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

2.1. Collective Bargaining

Collective bargaining law provides that the union enjoys successor rights when there has been the "sale of business". The term is defined broadly to include "*leases, transfers, and any other manner of disposition*" (LRA, s. 69). The labour board is vested with authority to determine whether a sale has occurred so that a declaration of successor rights should be issued. Needless to say, the question of when there has been the sale of a business has been the subject of an enormous amount of litigation. Generally speaking, the board looks to see whether there is continuity between the business of the transferee and the business of the transferor by examining a number of factors including, whether there is continuity in the work being performed, whether the location has changed, whether there is the same management, whether tangible assets and goodwill have been transferred and whether the employees have been transferred (see *Lester (W.W.) (1978) Ltd.*, [1990] 3 SCR 644). Successor rights can arise upon the sale of all a business or a discrete part of a business.

Because collective agreements operate between an employer and its employees, they cannot determine whether a purchaser or third party will be bound by the collective agreement. This is a matter within the excusive jurisdiction of the labour board. There is also no special provision regulating situations in which one contractor replaces another and hires the former contractor's employees, such as frequently occurs in the context of building maintenance services. Therefore, unless there has been a transfer of a business

between the two contractors and a declaration of successor rights to the labour board, collective bargaining rights will not be preserved.

2.2. Non-Unionized Employees at Common Law

At common law when a business is sold or transferred by one legal entity to another the legal starting point is that all employees are constructively dismissed and their only entitlement is to notice or pay in lieu of notice. A change in the ownership of a corporation is not a transfer between parties and does not terminate the contract since there is no change in the legal identity of the employer. Although the contract of employment is not assignable, where the purchasing employer hires the employees of the business it has purchased on the same terms and conditions and on the understanding that their accrued seniority from their previous employer will be respected, and the employees accept this understanding, no dismissal will be deemed to have occurred. This is called novation (see *Major v. Philips Electronics Ltd.* (2005), 253 DLR (4^{th}) 94 (BCCA)). The issue of whether a sale or transfer of a business has occurred has not proven to be contentious in this context.

2.3. The Employment Standards Act

The ESA establishes minimum standards applicable to all employees, whether or not they are unionized. It provides that in the event of the sale of business (which includes leases, transfers and other dispositions) employees who are hired by the purchaser are deemed *not* to have been terminated and so that their seniority for the purposes of the ESA includes the time they were employed by the vendor (ESA, s. 9). Litigation over the question of whether there has been a sale of a business for the purposes of the ESA is common but has produced a broader interpretation that under the LRA. The continuity of employment provision has been held to apply not only when there is a transfer of a business as a going concern but to other situations such as a contracting out of a function where the former employees of the company contracting out are hired by the company that now provides the service (see *Abbott v. Bombardier Inc. (c.o.b. Bombardier Aerospace)*, [2007] O.J. No. 1173 (ONCA)).

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

No. As mentioned, at common law the sale of a business will normally result in the constructive dismissal of all employees and it is entirely up to the purchaser whether it wishes to re-hire those workers. Employment standards laws do not change this result, although they do provide that if workers are re-hired on the same terms and conditions

there is continuity in their employment for the purposes of calculating employment standards entitlements, such as notice and severance pay.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

No, the terms of the collective agreement cannot be modified because of the transfer of a business. In virtue of an amendment the Ontario *Labour Relations Act* passed in 1970, the purchaser of a business, the transferee, stands in the shoes of the transferor with respect the collective agreement (LRA, s. 69(2)).

There is no suspension in the binding effect of the collective agreement on the transferee and the transferee stands in the same position as the transferor vis-à-vis any rights or obligations under the agreement. If either certification or bargaining right termination procedures are underway during the sale of the business, the transferee is treated as the transferor for the purposes of those proceedings before the Ontario labour board (LRA, s. 69(2)). These procedures continue as if the transferee where in fact the transferor.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

5.1. Common Law

Yes, but it is important to remember that under the common law when there is a sale of a business the employees are terminated and it is up to the purchaser whether or not to hire the former employees of the business it has acquired. If the purchasing employer hires those workers on the same terms and conditions of employment then normally the court will find there has been novation and the contract of employment is continuous between the vending and the purchasing employer. However, if the terms and conditions offered the employees by the purchaser are different then novation will not be found to have occurred and, if the employees were not given notice of termination by the vending employer they will be entitled to seek wrongful dismissal damages consisting of pay in lieu of notice. This is true even if they accept the offer of employment from the purchasing employer.

5.2. Employment Standards Act

Yes, but as under the common law it is important to remember that the purchasing employer has no obligation to hire the employees of the business it has acquired. However, if the employer does rehire those workers, but substantially changes the terms and conditions of employment, then the employees may argue that the provision of the ESA that deems that they were not terminated does not apply and that they can claim statutory notice and severance entitlements against the transferor.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

The Ontario *Pension Benefits Act* (R.S.O. 1990, c. P.8) and the Asset Transfer Regulation (O.Reg. 310/13) set out the transferee's obligations where the transferor made pension commitments to its workers. Upon the sale of a business the transferor and transferee may enter into an agreement to transfer the responsibility for administering the original pension plan for entitled persons under the plan to the transferee employer.

Where the transferee has devised a different pension plan, the transferee is able to move assets from the original pension plan to the successor plan pursuant to the rules set out in the Act and its Regulations. The successor plan is not required to provide identical pension benefits for the transferred members. However, a defined benefit plan cannot be converted into a defined contribution plan.

Workers entitled under the original plan must maintain the value of their pension on the date of sale when integrated into the successor plan. The calculation under the Regulations requires the each re-hired worker's benefit be calculated as if the worker was terminated. That value is isolated and migrated to the successor plan for each worker. Additionally, the successor plan must provide at least 85% of the value promised in the original pension plan.

A government official must consent to the transfer of assets from the original to the successor plan. That discretion must be exercised in accord with the Act, which requires that consent only be given upon an agreement between the transferee and transferor.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

Yes, the transferee will be liable for those debts as they remain in the business; however, the terms of the acquisition may include an indemnity clause that allows the transferee to seek indemnity for any outstanding labour debts. If no such clause exists, and the transferee knows of the labour debts, the purchase will likely be discounted for the value for those unpaid wages or unsatisfied Social Security contributions.

If the transferee hires the employees of the transferor and there has been novation under the common law, then the employees' entitlement to notice or pay in lieu is a contingent debt to the employees that may materialize at some point in the future. That debt is assumed by the transferee and continues to increase since notice entitlements are partially calculated on the basis of length of service. If the transferee does not hire the employees of the transferor, then the transferee is not liable for any unsatisfied notice entitlement owed to those employees at the time of the transfer.

The situation is the same under the ESA. Section 9 of the ESA provides that when a transferee hires an employee from the transferor the employee's length of service is treated as unbroken. Consequently, the transferee assumes a liability with respect to the notice requirement, which is a contingent liability in the sense that it is only triggered on dismissal. If the transferee does not hire an employee of the transferor, then the transferee does not assume that liability (*Ross (Monica) (Lavalin Engineers Inc. (Bankrupt)) (Re)*, ESC 94-202 (November 10, 1994 – Randall)).

There is one exception to this rule, which applies to the contracting in of building service such as janitorial services. Normally, building owners contract for such services and often change contractors. The new contractor commonly hires the employees of the former contractor. Because there is no sale or transfer of a business between the contractors, the employees have very little protection and are unable to accrue seniority for the purposes of the ESA. To address this situation, s. 10 of ESA provides that the employment of the employees of the outgoing provider is deemed not to be terminated and that they become the employees of the incoming provider, with the seniority that they accrued with the outgoing provider. As a result, if the new provider does not hire the employees of the former provider, the new provider is responsible to pay the accrued statutory notice and severance pay entitlements.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

Workers in Canada do not enjoy a general entitlement to representation. However, there are two situations in which such a right exists: unionized workers and representation in regard to occupational health and safety. These are considered below:

8.1. Unionized workers

As noted earlier, collective bargaining rights are transferred upon the sale of a business. Therefore, a union that represented a bargaining unit of the transferor continues to represent the workers in that bargaining unit after it has been transferred. Shop stewards and other local representatives appointed by the union or elected by the employees retain their positions.

The situation becomes more complicated where the transferee is also unionized and the employees of the transferor will be merged with employees represented by a different union. In this situation the labour board will determine whether separate bargaining units should be maintained or whether they should be merged. In deciding this question the board will consider both the employees' wishes and whether maintaining two units makes industrial relations sense. In the event that the board decides to merge the two units, a decision will have to be made about which union will represent the merged bargaining unit. Here the wishes of the majority of workers in the bargaining unit will be determinative.

8.2. Occupational Health and Safety

Occupational health and safety laws provide that in a workplace where more than five workers are regularly employed, the employer shall cause the workers to select a workplace health and safety representative (*Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 8). In workplaces with twenty or more employees there shall be a joint labour management health and safety committee half of whose members are to be appointed by the union where there is one or elected by the employees (OHSA, s. 9). In the event of a transfer of a business these workers representatives would continue in their position. However, if the transferee is merging the business into its own operations then the joint health and safety committees would be consolidated and the choice of worker representatives would either be made by the union representing those workers or by the employees.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

There is no duty to consult.

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

Generally, there are two possible outcomes in the event of a commercial bankruptcy. A company may liquidate or restructure. However, the legal regulations to achieve those outcomes are complex as there are two governing federal statues, provincial legislation and various processes to arrive at those outcomes. During a liquidation there may or may not be a sale of a going concern. During a restructuring the owner attempts to keep the business alive under current management. There are protections for workers in the event of a transfer or restructuring.

10.1. Protections on transfer

Where the business is sold as a going concern or a segment of the business is sold as a going concern during a bankruptcy or restructuring, then employees have the same protection under the ESA as they would have in any other transfer.

To illustrate, *Hentshell Clocks Canada* ((1977) Ltd. (Re), ESC 981 (April 23, 1981 – Howe)) a company went into bankruptcy and an employer purchased assets from the bankrupt estate and used them to produce the same products that had been produced prior to bankruptcy. The employer employed the same workforce. The referee concluded that there had been a transfer within the meaning of section 9 of the Act, which conferred on the employees the benefit of the length of service dating back the original employment with the transferor for the purposes of termination damages under the ESA.

Similarly, for the purposes of collective bargaining rights, if the labour board determines there has been a transfer of a continuing business in the context of a bankruptcy then the transferee would be found to be a successor employer bound by existing bargaining rights.

10.2. Protections on liquidation

Typically, during liquidation, the assets of the business are bundled into discrete packages and sold for the benefit for the creditors. When a business goes through restructuring proceedings, there is an attempt to strike a new deal with creditors to maintain the business as a going concern under old management.

In liquidation, an employee's claim to unpaid wages is given super priority with a limit whereas termination and severance pay receive the lowest priority. During a liquidation or pure bankruptcy employees have the benefit of paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act*, which came into force July 7, 2008 (RSC 1985, c B 3, s 136). Under that paragraph unpaid wages have super priority for six months of arrears up to $2,000 plus $1,000 expenses. Any balance is recoverable as a preferred creditor. Termination and severance pay are ranked with the general unsecured creditors, the lowest priority, and will receive payment on a *pari passu* basis. However, affected employees may claim unpaid wages and termination and severance pay from a wage earner protection plan to a maximum (in 2015) of $3,800 (S.C. 2005, c. 47).

In most provinces, directors of businesses are jointly and severally liable to employees of the corporation for labour debts. Therefore, at the point of insolvency when the business is no longer able to satisfy its wage obligations, workers have the right to enforce these obligations against the directors personally (for example, see *Canada Business Corporations Act*, RSC 1985, c. C-44, s 119, as well as the ESA, s. Part XX).

The rationale for this super priority and the wage protection fund is that employees are the least protected creditors of the bankrupt. Employees supply services to the business; however, they are rarely able to assess the financial health of their employer. In other words, they do not have the ability to assess the risk associated with supplying services to the business or diversity it.

10.3. Protections during a restructuring

In the event of an attempt to restructure the business and maintain it as a going concern workers are provided with a set of protections. Any collective agreement that the company has entered into remains in force and cannot be altered unless labour and management agree to strike a new collective agreement under section 33(8) of the *Companies' Creditors Arrangement Act* (RSC 1985, c C-36, s 33). Labour will be incented to pull back its position on wages and other compensation to keep the business alive. Moreover, the bargaining agent will have a claim as an unsecured creditor for an amount equal to the concessions granted with respect to the remaining term of the

agreement. The Act makes clear that, if the parties cannot agree on changes to the agreement, the court will not be allowed to intervene and modify its terms.

It must be noted, however, that even though the collective bargaining rights are continued during receivership, there is nothing to prevent the receiver, with the court's permission, from terminating all the employees if it decides that it is not in the best interests of the creditors to continue to operate the business pending its transfer or liquidation.

SUCCESSION AND TRANSFER OF BUSINESSES IN THE UNITED STATES

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1.a. Does the legal system of the United States establish a specific regulation regarding the rights of workers affected by a transfer of businesses? If so, is this rule the result of a supranational agreement?

United States law makes no special provisions for employees affected by the transfer of a business. Since employees are considered to be hired on an at-will basis, unless otherwise specifically agreed, they can be discharged at any time and for any reason that does not contravene a positive enactment of law.

One statute, the Workers' Adjustment and Retraining Notification Act (WARN Act), 29 U.S. Code § 2101, provides that employers with more than 100 employees must give notice 60 days in advance of plant closings or mass layoffs. This, of course, does not necessarily include a transfer of a business, unless, as a result, closings or layoffs will occur. General information about the statute and its requirements can be found at the U.S. Department of Labor website: http://www.dol.gov/compliance/laws/comp-warn.htm

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

There is no special legal provision that describes the "transfer of business" in American labor and employment law. The transfer of a business whose employees are covered by a collective bargaining agreement in the United States raises the problem known as "successorship," *i.e.*, what duties or responsibilities does a successor employer have to employees who were covered by the terms of a collective bargaining agreement between their bargaining representative (union) and the "predecessor" employer? As the U.S. Supreme Court has stated:

> "*The question whether [an employer] is a "successor" is simply not meaningful in the abstract…* [T]*he real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the*

> *employees of the former owner or their representative? The answer to this inquiry requires analysis of the interests of the new employer and the employees and the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of successor which is applicable in every legal contest*." (*Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249, 262, note 9 (1974)).

The Supreme Court in *Howard Johnson* also has made clear that "*where the successor corporation is the 'alter ego' of the predecessor, where it is 'merely a disguised continuance of the old employer*'" courts will have "*little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor*." (417 U.S. 249 at 259, note 5)

I will outline the law under the National Labor Relations Act, as interpreted by some key U.S. Supreme Court holdings. I will then address some special problems that arise in arbitration of "work preservation" and "successor and assign" clauses in collective bargaining agreements.

2.1. Successorship and the NLRA

The question in successorship cases is whether any duty exists on the part of the successor employer (a) to recognize the union that represented the predecessor's employees and (b) whether and to what extent, if any, the successor employer is bound by the terms of the collective bargaining agreement between the predecessor employer and the union that represented its employees. With the above-mentioned principles in mind, an outline of the law:

1. Firstly, a "successor" employer is under no legal obligation under the National Labor Relations Act to hire any of the predecessor's employees. As long as the successor does not discriminate, on the basis of anti-union animus, in the hiring process, the successor is free (a) to set the terms and conditions which it will offer employment and (b) to select those whom it wishes as employees. The successor has "the right not to hire any" of the predecessor's employees. See, *Howard Johnson,* 417 U.S. at 262.

As the Supreme Court stated in its decision in its *Howard Johnson* opinion, quoting from its earlier decision in *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), "*nothing in the federal labor laws 'requires that an employer … who purchases the assets of a business be obligated to hire all of the employees of the predecessor*

though it is possible that such an obligation might be assumed by the employer." 406 U.S. at 280, n.5. … *Burns* emphasized that "[a] *potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make those changes impossible and may discourage and inhibit the transfer of capital*." (406 U.S. at 287-288).

These principles exemplify the preference for capital mobility over employment stability that characterizes American employment law generally.

2. Any duty of a successor employer to recognize and to bargain with the union that represented the predecessor's employees only occurs if and at such time when the successor hires, as a majority of its workforce, the employees of the predecessor. The duty to recognize and to bargain with the union that represented the further conditioned by the following considerations:

(a) The predecessor's employees must continue to comprise "a unit appropriate for bargaining," *i.e.,* they must continue to share a "community of interest" in the new employer's organizational structure. In other words, if the successor's "operational structure and practices" so significantly differ from those of the predecessor, or the work performed by the predecessor's employees no longer is of the same sort and performed under similar conditions, the bargaining unit may no longer be appropriate, and no duty to bargain will attach.

(b) There will be no duty to recognize and bargain if the employer has a good faith, reasonable doubt as to the union's continued representative status among the predecessor's employee complement.

3. The successor employer's duty to recognize the union and to bargain with it becomes perfected only when the successor employer hires as a majority of its workforce the predecessor's employees. As previously mentioned, this does not mean that the successor necessarily is bound by the collective bargaining agreement between the union and the predecessor. As the Supreme Court explained in its *Burns Int'l Security Services* opinion, "*although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them.*"

This rule reflects, in part, the principle of "free collective bargaining" central to the American scheme of collective labor law, which forbids the state from imposing terms on the parties. Under § 8 (d) of the NLRA, the duty to bargain "in good faith" that binds both the parties "*does not compel either party to agree to a proposal or require the making of a concession*." The NLRA forbids an employer to make unilateral changes in "mandatory terms or working conditions" without first bargaining to impasse with the union. However, as the Supreme Court explained in *Burns,* "[i]*t is difficult to understand how [a successor employer] could be said to have changed unilaterally any pre-existing term or condition of employment … when it had no previous relationship whatsoever to the bargaining unit…*" (406 U.S. at 294).

4. To summarize: a successor employer generally is free to set the initial terms of employment, and to hire whomever it chooses, as long as it does not discriminate on the basis of anti-union animus against employing the predecessor's employees. It has no duty to hire any of the predecessor's employees. The duty to recognize and bargain with the union representing the predecessor's employees only attaches, as explained above, at such time when those employees constitute the majority of the successor employer's workforce.

Nevertheless, the Supreme Court has explained that "[a]*lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employer before he fixes the terms. In other situations, however, it may not be clear until the successor has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of employees in the unit as required by § 9 (a) of the Act*."

For an example of the application of the "perfectly clear" successor rule, see *Dupont Dow Elastomers, LLC v. NLRB,* 296 F.3d 495 (6th Cir. 2005).

5. The Question of what constitutes a "representative complement" of employees under *Burns.*

As just mentioned, in *Burns,* the Supreme Court stated that whether a successor employer has a duty to bargain with the union that represented the predecessor's employees "*may not be clear until the successor has hired his full complement of employees.*" How might it be determined that a successor has hired such a "complement

of employees," and through so doing, has triggered the duty to recognize and bargain with the union that represented the predecessor's employees?

This situation was treated in the Supreme Court's opinion in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). There, Sterlingwale Corp. had operated a textile dyeing and finishing plant in Fall River, Massachusetts for over 30 years. As long as Sterlingwale Corp. had been in existence, its employees were represented by a union.

Sterlingwale experienced a business decline and it ceased operations in the late summer of 1982. A former Sterlingwale company officer and the president of one of Sterlingwale's major customers formed the Fall River Dyeing & Finishing Corp. and Fall River acquired the plant, real property and equipment owned by Sterlingwale.

In September of 1982, Fall River began operating out of Sterlingwale's former facilities and it began to hire employees. Fall River advertised for workers and supervisors in a local newspaper, and one of the organizer's of Fall River also personally made contact with several prospective supervisors. Fall River hired 12 supervisors, of whom 8 had been prior Sterlingwale supervisors, and 3 had been Sterlingwale production workers.

Fall River planned initially to hire one full shift of workers –55 to 60 employees– and then planned to "*see how business would be*" after hiring them. If business permitted, Fall River hoped to expand to two shifts. The first shift of employees spent 4 to 6 weeks in start-up operations, and another month in experimental production.

In mid-October of 1982, the union that had represented the former Sterlingwale employees requested that Fall River recognize it as the collective bargaining representative of the Fall River production workers, and to begin bargaining with it. Fall River refused this request as legally groundless. At that time, 18 of Fall River's 21 employees were former employees of Sterlingwale.

By November of 1982, Fall River had employees in a complete range of positions and was engaged in production and in handling orders. By mid-January 1983, Fall River had an entire shift of workers employed. Of this shift of 55 employees, 33 had been employees of Sterlingwale. By mid-April, Fall River had 2 shifts of employees. For the first time, ex-Sterlingwale employees were a minority, but barely: 52 to 53 of 107 employees.

The union filed an unfair labor practice charge with the National Labor Relations Board, alleging that Fall River unlawfully refused to recognize the union and to bargain with it.

The NLRB concluded that Fall River was a successor to Sterlingwale, and that the employees worked under the same conditions, on the same machines, doing the same type of work under the supervision of largely the same supervisors and that the production processes were unchanged. The NLRB held that Fall River, as the successor employer, had a duty to bargain that perfected in mid-January, when it employed a "representative complement" of employees.

The Supreme Court examined its holding in *Burns* and upheld the NLRB's interpretation and application of it in this case. The Court held:

(a) That the NLRB was justified in applying its "*continuing presumption of majority support*" doctrine on the facts of this case. According to Board doctrine, approved by the Supreme Court, a union enjoys an irrebuttable presumption of majority support for a year, after which it enjoys a continuing (but rebuttable) presumption of majority support thereafter. This presumption is intended to stabilize the bargaining relationship and to promote industrial peace. The Court found that the "*rationale behind the presumptions is particularly pertinent in the successorship situation… During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it… Accordingly, during this unsettling transition period, the union needs the presumption of majority status to which it is entitled to safeguard its members' rights and to develop the relationship with the successor*."

The Court also noted that, "*to a substantial extent the applicability of Burns rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation*" under the NLRA is activated.

Construing its *Burns* decision, the Court held "*that a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified. Where, as here, the union has a rebuttable presumption of majority status, this status continues despite the change in employers*."

(b) The Court then proceeded to apply the 3 rules that govern the determination of successorship. These are:

(i) Substantial continuity of the business: factors include whether the business of the predecessor and successor are substantially the same; whether employees

perform the same type of work under the same or similar conditions and with substantially the same supervision; whether the production processes remain similar, the successor produces the same sort of product, and has the same sort of customers.

The Court also noted that the hiatus between Sterlingwale's closure and Fall River's start-up was not decisive. The Court indicated that a hiatus was only one factor in determining substantial continuity and relevant only where there are other indicia of discontinuity. Where other factors indicate continuity, and the hiatus is part of a normal business start-up, the "totality of the circumstances" will present a successorship situation.

(ii) Substantial and representative complement rule: the factors here are whether the job classifications designated for the operation were filled or substantially filled; the size of the complement on the date and the time expected to elapse before a substantially larger complement would be hired; and the relative certainty of the employer's expected expansion.

(iii) The "continuing demand" rule: a union's demand to represent employees, made prematurely and rejected by the employer, remains in effect until the time the employer has engaged a "substantial and representative complement."

2.1. "Successor and Assign" Clauses and Successorship Issues:

In American labor law, disputes over the interpretation and application of the terms of a collective bargaining agreement typically are resolved through binding arbitration, a process whose procedures and limits are determined by the parties themselves. Federal labor law has been construed by the Supreme Court to permit courts to order the specific performance of the promise to arbitrate. In other words, parties can be enjoined against their refusal to arbitrate, and a strike over an arbitrable grievance can be enjoined. Such orders are frequently referred to as "injunctions in aid of arbitration," *i.e.,* the injunction is issued to assist in preserving arbitration as an institutional process.

A collective bargaining agreement may contain "work preservation" and/or "successors and assigns" language. Work preservation language seeks to prevent an employer from assigning work done by the represented employees to workers outside the unit or the company (*e.g.,* by "outsourcing"). Successor and assign language state that the collective bargaining agreement between the employer and a union will bind all "successors and assigns" or may require the predecessor employer to require a successor

to take the terms of the bargaining agreement as part of any sale or assign of the company.

In the *Howard Johnson Co.* case, the predecessor employer (the Grissom family) owned a restaurant and hotel, which they operated as a francisee of Howard Johnson, then a well-known chain. The Grissom's had a collective agreement with the union that represented the employees at the hotel and restaurant. Grissom sold the business's chattel property and leased its real property to Howard Johnson Co,, which assumed direct operation of the hotel and restaurant.

Howard Johnson Co. disclaimed the collective bargaining agreement, discharged the Grissom's employees, and hired a new complement, which included very few of the Grissom's former employees. The union representing those employees sought an injunction against Howard Johnson which would have required it to arbitrate the effect of the "successor and assigns" language in the collective agreement made between the Grissom's and the union.

Relying in part on the *Burns* case discussed above, the Court reversed a lower court's decision granting such an order. Among other things, the Court expressed surprise that the union did not seek to enjoin the sale by Grissom's and seek an order requiring Grissom to arbitrate the effect of the successors and assigns language. The Court also noted that Howard Johnson could not be bound by either the collective agreement or the arbitration language in it, since they were not a "successor" employer under *Burns.* Distinguishing a prior case involving somewhat similar facts, the Court also noted that the Grissom corporation remained in existence, and the remedy here was to arbitrate the dispute with it.

Although it goes beyond the bounds of the questions posed here, one might note that, generally speaking, "successor and assigns" language has proved rather difficult to enforce.

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

Generally speaking, no. See answer Q2 above.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

Yes: see answer Q2 above.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

As explained in answer Q1, since there is no general regulation restricting transfers, the answer is no.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

Pension or other obligations that fall within the scope of the Employee Retirement income and Security Act of (ERISA) 1974, 29 U.S.C. Ch. 18, will be regulated by the terms of this statute. For general information, see: http://www.dol.gov/dol/topic/health-plans/erisa.htm. This is a very complex statute, and space limits further explication here.

In the case of a bankruptcy where employees are represented for the purposes of collective bargaining, see generally Q10 below.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

Generally speaking, a successor corporation assumes all liabilities of the predecessor; these can, of course, be negotiated over by the parties as part of a sale.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

See answer Q2 above.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

Unless the employees are represented for the purposes of collective bargaining, they have no consultation rights. They may be required to receive notice under the WARN Act: see Q1 above.

In the collective bargaining context, it can depend on the language of the collective agreement, as well as the nature of the transaction. There would generally be at least a right to bargain the effects of a decision, but this is fact driven and cannot be answered easily in the abstract.

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

Very broadly speaking, unpaid wages or obligations to employees are considered unsecured liabilities and are given no preference.

The rejection of a labor agreement as an executory contract is governed by the provisions of 11 U.S.C. § 1113, which requires a debtor in possession or a bankruptcy trustee to maintain the collective agreement in effect while conferring, subject to the duty of good faith, concerning the modification of its terms. Any modification or the complete rejection of the collective agreement must be "*necessary to permit the reorganization of the debtor*"; must be fair and equitable to all the parties; must be communicated to the union before filing an application with the bankruptcy court seeking rejection of the collective agreement.

The bankruptcy court must rule on applications for modification within a short period, and may permit "interim changes" to the terms of the agreement by the debtor in possession or the trustee if such changes are "*essential to the continuation of the debtor's business, or in order to avoid irreparable damages to the estate*."

The courts have held that 11 U.S.C. § 1113 does apply to retiree benefits, and that its procedures must be followed before a debtor in possession or a trustee may alter or reject retiree benefits paid subject to the terms of a collective agreement.

Empirical studies have shown that in the majority of cases, bankrupt companies are able to shed their obligations in bankruptcy proceedings.